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MIDDLE JUSTICE:
ANTHONY KENNEDY'S FREEDOM OF EXPRESSION JURISPRUDENCE

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A paper to be presented to the 1996 Convention of the Association
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ABSTRACT

The paper argues that Supreme Court Justice Anthony M. Kennedy plays a pivotal role in defining the modern meaning of freedom of expression. It suggests that in the majority of his decisions on freedom of expression, Kennedy has conformed to a libertarian ideology. In a minority of cases, he has favored restrictions of speech in a manner consistent with a conservative value system. Overall, Kennedy has furthered the modern court's libertarian and conservative agendas by voting with the majority.

MIDDLE JUSTICE:
ANTHONY KENNEDY'S FREEDOM OF EXPRESSION JURISPRUDENCE

INTRODUCTION

The purpose of this paper is to help elucidate the modern meaning of the concept of freedom of expression by examining the jurisprudence of a single justice who may play a pivotal role in defining the concept.

Although freedom of expression is guaranteed by the U.S. Constitution, the Supreme Court actually establishes what the concept means in a given era. That is to say, the Supreme Court shapes the meaning of the Constitution through performing its function of judicial review.[1] Individual justices, then, also help determine the meaning of the Constitution in general and freedom of expression in particular.[2] Thus, understanding whether a justice plays a powerful role in setting doctrine and what that role is, becomes important. Scholars continually reaffirm the validity of this type of research by writing articles and books about individual justices' jurisprudence on freedom of expression.[3]

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[1] For discussion of the judicial review function, see Edmund N. Cahn, ed., Supreme Court and Supreme Law (New York: New York University Press, 1954); Albert P. Melone and George Mace, "Judicial Review: the Usurpation and Democracy Questions," Judicature 71 (December-January 1988): 202-210; Jeffrey M. Shaman, "Interpreting the Constitution: the Supreme Court's Proper and Historic Function," Judicature 71 (August-September 1987): 84-87, 122; and Elliot E. Slotnick, "The Place of Judicial Review in the American Tradition: the Emergence of and Eclectic Power," Judicature 71 (August-September 1987): 68-79.

[2] See, e.g., Jeremy Cohen, Congress Shall Make No Law: Oliver Wendell Holmes, the First Amendment, and Judicial Decision-Making (Ames: Iowa State University Press, 1989), 3; Robert H. Keller, Jr. William O. Douglas Symposium (Westport, Conn.: Greenwood Press, 1979), introduction; and Philip B. Kurland, Free Speech and Association: The Supreme Court and the First Amendment (Chicago: The University of Chicago Press, 1975), preface.

[3] See, e.g., Paula C. Arledge and Edward V. Heck , "Justice O'Connor and the First Amendment 1981-84," Pepperdine Law Review 13 (May 1986): 993-1019; Michael Armstrong, "A Barometer of Freedom of the Press: the Opinions of Mr. Justice White," Pepperdine Law Review 8 (December 1980): 157-187; Rex Armstrong, "Free Speech Fundamentalism--Justice Linde's Lasting Legacy," Oregon Law Review 70 (Winter 1991): 855-894; Lillian BeVier, "Justice Powell and the First Amendment's `Societal Function': a Preliminary Analysis," Virginia Law Review 68 (February 1982): 177-201; Scott Burrell and Clay Smith Jr., "Justice Thurgood Marshall and the First Amendment," Arizona State Law Journal 26 (Summer 1994): 461-478; Daniel A. Farber and John E. Nowak, "Justice Harlan and the First Amendment," Constitutional Commentary 2 (Summer 1985): 425-462; Robyn S. Goodman, "Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: a Decade in Review," Communications and the Law 15 (December 1993): 3-35; Dennis Hale, "Marshall Provided Key Votes, but Few Opinions, on Freedom of Speech and Press," Communications and the Law 16 (September 1994): 25-41; Robert C. Lind Jr., "Justice Rehnquist: First Amendment Speech in the Labor Context," Hastings Constitutional Law Quarterly 8 (Fall 1980): 93-123; Karen Nelson Moore, "Justice Blackmun's Contributions on the Court: the Commerical Speech and Taxation Examples," Hamline Law Review 8 (January 1985): 29-50; Philip J. Prygoski, "Justice Sanford and Modern Free Speech Analysis: Back to the Future?" The Kentucky Law Journal 75 (Ocober 1986): 45-101; Mark C. Rahdert, "Preserving the Archives of Freedom: Justice Blackmun and First Amendment Protections for Libraries," Dickinson Law Review 97 (Spring 1993): 437-464; David A. Schultz, "Justice Antonin

This paper will examine the freedom of expression jurisprudence of Justice Anthony M. Kennedy, who became the 104th U.S. Supreme Court Justice in 1988. Kennedy's approach to freedom of expression law may be of particular importance because of his position on the ideological spectrum of the court. As this paper will suggest, Kennedy is a moderate, often voting with David Souter and Sandra Day O'Connor. To his right are Chief Justice Rehnquist, Clarence Thomas and Antonin Scalia, while on the left are Ruth Bader Ginsburg, Stephen Breyer and John Paul Stevens. Professor Christopher E. Smith has argued that Kennedy's position may have made him a "power broker" in the middle of the court who, at least occasionally, could have the opportunity to render swing votes.[4]

Moderate justices may have important functions in the Rehnquist Court. On the surface, the court appears to have a strong conservative coalition, usually consisting of about six members, wrote Stanley Friedelbaum, author of *The Rehnquist Court: In Pursuit of Judicial Conservatism* .[5] Sometimes, however, a middle group emerges as a voting bloc. [6] "On occasion... there is unmistakable evidence of a centrist coalition that may control the outcome in critical areas of decision making,"[7] Friedelbaum said. In a court that is divided along ideological lines, the centrist justices often control the outcomes of non-unanimous cases because their votes are pivotal.[8]

Kennedy may be powerful as a coalition builder. In a discussion of the ways to measure power on the Supreme Court, political scientist Saul Brenner commented that one possible measure "assigns all the power to the member of the winning coalition who casts the pivotal vote and thereby creates the

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Scalia's First Amendment Jurisprudence: Free Speech, Free Press and Association Decisions," The Journal of Law & Politics 9 (Spring 1993): 515-560; Michael Wahoske, "Chief Justice Burger and Freedom of the Press," Oklahoma Law Review 45 (Spring 1992): 121-138; Ethel S. White, "The Protection of the Individual and the Free Exchange of Ideas: Justice Potter Stewart's Role in First and Fourth Amendment Cases," University of Cincinnati Law Review 54 (Winter 1985): 87-128.

[4] Christopher E. Smith, "Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation," Oklahoma Law Review 45 (Fall 1992): 476.

[5] Stanley H. Friedelbaum, The Rehnquist Court: In Pursuit of Judicial Conservatism (Westport, Conn.: Greenwood Press, 1994), xiv.

[6] Linda Greenhouse, "Liberal Giants Inspire Three Centrist Justices," New York Times, 25 October 1992, A1.

[7] Friedelbaum, xviii.

[8] Lawrence Baum, The Supreme Court, 5th ed. (Washington, D.C.: Congressional Quarterly, Inc., 1995), 177.

winning coalition."[9] Brenner and political scientist Harold Spaeth noted that this model views power as an outcome rather than a process.[10] "The powerful justice is one who casts winning (majority) votes, while the powerless disproportionately dissent," they wrote.[11]

Indeed, in the 57 non-unanimous freedom of expression cases that Kennedy participated in through the 1994-95 term, he voted with the majority of the court a higher percentage of the time than any justice except Breyer, who participated in only eight cases.[12] Seventeen of these cases resulted in five-four votes by the justices. In the five-four decisions, Kennedy tied Scalia as the justice in the majority most often.[13] But Kennedy's majority votes in five-four cases were the most evenly divided between cases advancing and cases limiting freedom of expression of any justice,[14] supporting the idea that his vote is pivotal.

Interestingly, in the 73 freedom of expression cases that Kennedy participated in through the 1994-95 term, his overall favorableness toward freedom of expression fell close to the middle of all of the justices.[15] In fact, the mean of the favorableness percentages of all of the justices was 55.0 %. Kennedy's favorableness percentage (57.5%) was the closest to the mean of any justice except Souter,

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[9] Saul Brenner, "Measuring Policy Leadership on the U.S. Supreme Court: A Focus on Majority Opinion Authorship," in Studies in U.S. Supreme Court Behavior, eds. Saul Brenner and Harold J. Spaeth (New York: Garland Publishing, 1990), 137.

[10] Saul Brenner and Harold J. Spaeth, "Concurring and Dissenting Opinions," in Studies in U.S. Supreme Court Behavior, eds. Brenner and Spaeth, 253.

[11] Id., 253.

[12] Kennedy voted with the majority in 46 of 57 non-unanimous freedom of expression cases, or 80.7 percent of the time. Other justices voted with the majority as follows: Rehnquist (71.9 %), Brennan (50.0%), White (68.9%), Marshall (42.4%), Blackmun (65.3%), Stevens (47.4%), O'Connor (70.2%), Scalia (66.7%), Souter (75.8%), Thomas (55.0%), Ginsburg (67.0%), and Breyer (87.5%).

[13] Kennedy and Scalia voted with the majority 70.6% of the time in cases that resulted in five-four decisions. Other justices voted with the majority as follows: Rehnquist (58.8%), Brennan (66.7%), White (53.3%), Marshall (45.5%), Blackmun (53.5%), Stevens (35.3%), O'Connor (58.8%), Souter (54.5%), Thomas (50.0%), Ginsburg (0.0%), and Breyer (50.0%).

[14] Kennedy voted with the majority to advance freedom of expression in seven of the seventeen five-four cases. He voted with the majority to limit freedom of expression in five of the cases. Scalia voted to advance freedom of expression in three of the cases and to limit it in nine cases.

[15] To calculate favorableness toward freedom of expression, the number of times a justices voted with the majority in cases in which the decision advanced freedom of expression was added to the number of times a justice dissented from cases limiting freedom of expression. To enable comparison between justices, the number of favorable votes was divided by the number of cases in which the justice participated. The favorableness results were: Rehnquist (29.2%), Brennan (76.5%), White (32.8%), Marshall (80.5%), Blackmun (71.4%), Stevens (64.4%), O'Connor (45.2%), Scalia (39.7%), Kennedy (57.5%), Souter (56.4%), Thomas (48.3%), Ginsburg (53.3%), and Breyer (60.0%).

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whose favorableness percentage was 56.4%. Furthermore, the overall record of the court was 52.1% favorable. Thomas and Souter were closer to this figure than Kennedy, but only by a couple of percentage points. Because Kennedy has participated in over twice the number of cases in which Thomas has participated and nearly twice the number in which Souter has participated, his record may be the most reflective of the modern court.

IDEOLOGIES: A FRAMEWORK FOR ANALYSIS

This paper attempts to demonstrate that both traditional libertarianism and social conservatism have motivated Kennedy's freedom of expression decisions during his tenure on the Supreme Court. In a few exceptional cases, modern liberalism, as distinct from libertarianism, has played a role in Kennedy's decisions. Outlining the ideologies at this point will facilitate later discussion.

According to Webster's, a "libertarian" is "an advocate of full individual freedom of thought and action."[16] First Amendment scholar Mark Graber has argued, "By definition, libertarians are persons who assert that government should rarely, if ever, regulate speech."[17] Graber explained that libertarians believe unrestricted debate is necessary for an effective representative democracy.[18] Ideology scholar Paul Kurtz went as far as to assert, "Libertarians abhor any governmental control of the communications media."[19]

Conservatism is distinct from libertarianism in several ways. Webster's defines "conservative" as "tending to preserve established institutions, etc.; opposed to change."[20] Political science professor David Spitz explained that all conservatives believe in "the existence of an absolute truth, of an objective moral order."[21] Conservatives feel authority and tradition "to be necessary for a satisfying life for the individual and for a stable society," wrote Professor William Harbour.[22]

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[16] Webster's New World Dictionary, 3d college ed. (1990), s.v. "libertarian."

[17] Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (Berkeley: University of California Press, 1991), 7.

[18] Id., 5.

[19] Paul Kurtz, "Libertarianism as the Philosophy of Moral Freedom," in George W. Carey, ed., Freedom and Virtue: The Conservative/Libertarian Debate (Lanham, Md.: University Press of America, 1984), 136.

[20] Webster's New World Dictionary, 3d college ed. (1990), s.v. "conservative."

Several characteristics of conservatism emerge from its emphasis on authority and order. In particular, Harbour noted that the appreciation for a moral order has led to "veneration of the family as the most important social bond,"[23] and respect for the rule of law. Scholar Robert Nisbet noted that conservatives support "the nation" as a means to protect the institutions they value.[24] Conservatives may be willing to constrain freedom of expression at times because, as Spitz wrote, they believe, "not speech, but 'good' speech, not conflicting ideas, but 'right' ideas, should alone be tolerated."[25]

The values of the "New Right," which developed in the early 1980s as a fundamentalist branch of the Republican Party, have also become an important part of modern conservatism. Historian William Hixon traced the roots of the New Right in American conservatism, and found that these profamily activists often had specifically religious origins.[26]

Scholars suggest a key characteristic of the New Right is a high regard for the traditional family.[27] Accordingly, the New Right is threatened by efforts to legitimize alternative lifestyles, such as homosexual rights movements and women's rights movements, explained Hixon and scholar Paul Gottfried.[28] In a similar vein, modern conservatives have been united in a protest against legalized abortion.[29]

In contrast to the New Right, the pre-eminent principle of the liberal ideology is a belief in the need for political equality, argued Spitz.[30] Liberals believe equality of opportunity is essential, and push for the elimination of hereditary privilege and discrimination based on factors such as religion or sex, he said.[31] Twentieth-century liberals have also sought to extend the role of the state in performing social functions necessary for the welfare of individuals, argued ideology scholar Paul Kurtz. Thus, modern liberals believe it is the duty of society "to ameliorate the lot of poor persons and redistribute wealth" in the name of equality, he said.[32]

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[21] David Spitz, The Real World of Liberalism (Chicago: The University of Chicago Press, 1982), 36.

[22] William R. Harbour, The Foundations of Conservative Thought: An Anglo-American Tradition in Perspective (Notre Dame: University of Notre Dame Press, 1982), 67.

[23] Id., 7.

[24] Robert Nisbet, "Uneasy Cousins," in Freedom and Virtue: The Conservative/Libertarian Debate, ed., George W. Carey, 18-23.

[25] Spitz, 37.

[26] William B. Hixon, Searching for the American Right Wing (Princeton: Princeton University Press, 1992), 199.

[27] See, e.g., Paul Gottfried, The Conservative Movement, rev. ed. (New York: Twayne Publishers, 1993), 106; and Hixon, 185.

[28] Gottfried, 106; and Hixon, 185.

[29] Gottfried, 106.

[30] Spitz, 31.

Liberalism, as distinct from conservatism, has been associated with the lower classes, according to Spitz.[33] Liberals have traditionally supported labor unions "to curb the great economic powers of the owners and managers and give workers a voice in determining the conditions under which they labor," he wrote.[34]

In summary, scholars have suggested that libertarians value individual liberty above all else, while conservatives are more willing to sacrifice such liberty to perpetuate the authority and order they believe are essential in a good and moral society. Liberals also believe in individual liberty, but modern liberals may advocate equality at the expense of liberty.

BACKGROUND

Kennedy took the oath of office as the 104th Supreme Court justice on February 22, 1988. Professor Albert P. Melone studied Kennedy's first two terms on the court and concluded that he was quickly integrated into the conservative wing.[35] Melone noted that Kennedy wrote relatively few opinions during his first term--four concurring and two dissenting out of 77 cases in which he participated.[36] Nevertheless, those he did write showed a "close alignment with the ideological agenda of the president who appointed him."[37]

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[31] Id., 34.

[32] Kurtz, 135.

[33] Spitz, 31.

[34] Id., 35

[35] Albert P. Melone, "Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy," Judicature 74 (June-July 1990): 9.

[36] Id., 8.

[37] Id., 10.

According to the *Harvard Law Review*'s annual statistics, in Kennedy's first term, he voted with Scalia and Rehnquist in more than 85 percent of the cases in which he participated.[38] By his second term, Kennedy voted with Rehnquist in about 90 percent of the cases, compared to his less than 60 percent alignment with liberals Marshall, Brennan and Blackmun.[39]

But by 1992 scholars began to see Kennedy not as a fifth vote for the conservative majority, but as a swing vote,[40] similar to his predecessor Lewis Powell. Smith said Kennedy was, "an emerging 'power broker' in the middle of the court who can determine the outcomes of cases when the court is deeply divided."[41] Law Professor Paul Baier noted that Kennedy was "capable of harmonizing a majority behind clear and certain rules."[42]

Other analysts described Kennedy's shift of alignment. Carter said, "He casts himself with justices Sandra Day O'Connor and David Souter in a new alignment that still is decidedly to the right, but more moderate in tone and approach."[43] In the spring of 1992, the Supreme Court clerks put on a skit in which they depicted Kennedy's departure from the far right, playing the music from the television show, "Flipper."[44] In 1991, Kennedy's closest voting partner was Souter. They voted together in 74 percent of the cases. Meanwhile, Kennedy's level of agreement with Rehnquist had fallen to 67 percent.[45]

Scholars addressing Kennedy's record on freedom of expression argued that it exhibited a similar change, but that the change came earlier in his tenure on the court. Lawyer Lawrence Friedman described Kennedy's transition in First Amendment jurisprudence in an article entitled, "The Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment." Friedman began his analysis by describing Kennedy's initial conservatism in freedom of expression cases.[46] He said Kennedy's early ideology was best exhibited by his opinion in Ward v. Rock Against Racism,[47] a case involving New York City's regulation of sound volume at concerts in Central Park. Writing for the majority, Kennedy said that the regulations were reasonable, non-content-based time, place and manner restrictions. However, in coming to this conclusion, Kennedy dismissed the idea that such regulations must be the "least restrictive" alternative, saying instead that they simply must be narrowly tailored to serve a substantial government interest.[48] Friedman argued that this decision was a "paradigmatic example of Kennedy as the conservative decision-maker, reflecting a penchant for judicial restraint in cases involving individual speech rights."[49]

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[38] "The Statistics," Harvard Law Review 104 (November 1989): 369.

[39] Id.

[40] Paul R. Baier, "Charges of Mediocrity Unfounded," American Bar Association Journal (February 1992): 59; Terry Carter, "Crossing the Rubicon," California Lawyer 12 (October 1992): 40; and Smith, 476.

[41] Smith, 476.

[42] Baier, 59.

[43] Terry Carter, "Crossing the Rubicon," California Lawyer 12 (October 1992): 40.

[44] Id., 104.

[45] "The Statistics," Harvard Law Review 106 (November 1992): 379.

But Friedman points out that Kennedy began to support freedom of expression in his opinion in Texas v. Johnson,[50] the flag burning case that was decided in Kennedy's first term. The majority of the court upheld the right to burn the United States flag as protected political speech. Friedman said Kennedy's "joining the majority demonstrates a willingness to appreciate and support basic principles of freedom of speech."[51] Other scholars agreed. Reuben saw Kennedy's concurrence in Texas v. Johnson as "the first public sign that Kennedy might feel some conflicts about the court's conservative agenda."[52]

Friedman argued that Kennedy's freedom of expression jurisprudence took another step toward libertarianism in his opinion in a 1991 case involving "Son of Sam" laws.[53] At issue in this case was New York's law requiring the income from books describing crime to go to the victims of the crime. The majority of the court held that the law was a content-based regulation of free speech, noting that New York had a compelling interest to make such a regulation, but that this statute was over inclusive, and therefore violated the First Amendment. Kennedy concurred in the judgment but argued that New York's law was a content-based regulation, which, regardless of the state interest, would violate the First Amendment. He said that once the court determined the law was a content-based regulation, analysis should have ended. Friedman said Kennedy's analysis in this case "resembles less the conservatism of a justice concerned with interpreting individual freedoms narrowly, and more the sort of absolutism championed by Justice Hugo Black."[54]

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[46] Lawrence Friedman, "The Limitations of Labeling: Anthony M. Kennedy and the First Amendment," Ohio Northern Law Review 20 (Spring 1993): 228.

[47] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[48] Id., 799.

[49] Friedman, 229-31.

[50] Texas v. Johnson, 491 U.S. 397 (1989).

[51] Friedman, 234.

[52] Reuben, 38.

[53] Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991).

Friedman argued that a year later, Kennedy revisited this more liberal approach in his opinion in a case involving the distribution of religious pamphlets in airport terminals.[55] In a per curiam opinion, the court held that a regulation prohibiting the repetitive distribution of literature in a public airport terminal was unconstitutional. However, the justices disagreed as to whether the terminal was a public forum where speech in general receives more protection. Kennedy argued that the terminal was a public forum. Friedman said that Kennedy "again went further than most of the other conservative justices in interpreting the First Amendment to protect the interests of the individual over the interests of the many."[56]

Summarizing Kennedy's freedom of expression jurisprudence through the 1991 term, Friedman wrote:

> He has, over the course of his opinions, gradually shifted his perspective and interpretation of individual rights under the Fist Amendment and embraced a decidedly broader understanding of the First Amendment than the "true conservative" introduced by President Reagan in 1987, rejecting the conservative constitutionalism of his peers, justices Rehnquist and Scalia, as well as displacing expectations upon his nomination.[57]

Neil Skene, writing for *Congressional Quarterly Weekly Reports,* agreed, saying Kennedy's freedom of expression jurisprudence "demonstrates anew that presidents rarely get what they expect from their appointees."[58]

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[54] Friedman, 239.

[55] Lee v. International Society for Krishna Consciousness, 505 U.S.---, 120 L. Ed. 2d 669 (1992).

[56] Friedman, 247.

[57] Id., 226.

[58] Neil Skene, "Scalia and Kennedy Defy Predictions," Congressional Quarterly Weekly Report 48 (7 April 1990): 1118.

ANALYSIS

The following analysis will demonstrate that Kennedy's freedom of expression jurisprudence has predominantly embodied libertarian and conservative values. Specifically, Kennedy generally has taken a classic libertarian approach to freedom of expression, voting to strike down restrictions on speech. At times, his libertarian votes also supported outcomes consistent with a conservative agenda. When Kennedy's decisions failed to represent libertarian values because they upheld restrictions on speech, they almost always favored outcomes consistent with a conservative ideology. The exceptions to this trend consisted of cases decided unanimously by the court supporting the liberal value of equality, and a couple of decisions consistent with other aspects of Kennedy's jurisprudence.

The Libertarian Approach

In 39 of the 75 freedom of expression cases that Kennedy treated on the merits through the 1994-95 term, he voted in a libertarian fashion to strike down a regulation on speech or its application. The regulations that Kennedy voted against generally assumed one of two forms: (1) restrictions that discriminated on the basis of the content of speech, and (2) content-neutral restrictions that resulted in total or partial bans of various kinds of speech.

Kennedy outlined his general approach to evaluating content-based restrictions on speech in Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board.[59] In this case, the Supreme Court reviewed the constitutionality of New York's "Son of Sam" law, which required that the proceeds from books or other works by admitted criminals be deposited into a fund and made available to the victims of the crime. O'Connor wrote the opinion for the unanimous court, which held that the Son of Sam law established "a financial disincentive to create or publish works with a particular content."[60] The opinion further stated that because the content regulation was not narrowly tailored to serve a compelling state interest, the law was unconstitutional.[61]

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[59] Simon & Schuster v. Crime Victims Board, 502 U.S. 105 (1991).
[60] Id., 115.
[61] Id., 123.

Kennedy wrote a concurring opinion, which argued that the Son of Sam law was unconstitutional simply because it regulated content. He felt that the court should not have used the compelling interest and narrow tailoring analysis. "The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional," he wrote.[62]

Kennedy said that the compelling interest and narrow tailoring analysis had "found its way"[63] into the court's First Amendment analysis from equal protection jurisprudence. He felt that its use threatened First Amendment protections. He argued,

> Borrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.[64]

Kennedy then outlined his categorical approach to evaluating content-based regulations by listing the "few legal categories in which content-based regulation has been permitted or at least contemplated."[65] He suggested content-based regulations may be allowed in cases of obscenity, defamation, incitement, and "situations presenting some grave and imminent danger the government has the power to prevent."[66] Kennedy argued that the use of these traditional legal categories of speech not protected by the First Amendment is preferable to "ad hoc balancing."[67]

Kennedy put his Simon & Schuster philosophy regarding content-based restrictions to work in several cases. In classic libertarian style, he voted with the majority in Riley v. National Federation of the Blind,[68] to strike down aspects of a North Carolina statute regulating the speech of professional fund-raisers. One provision of the statute required fund-raisers to disclose to potential donors the percentage of funds retained in prior solicitations.[69] Writing for the majority, Brennan stated that the regulation was an impermissible content-based regulation of speech.[70]

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[62] Id., 124.
[63] Id., 125.
[64] Id., 124-125.
[65] Id., 127.
[66] Id.
[67] Id.
[68] Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988).

In Forsyth County v. The Nationalist Movement,[71] Kennedy again voted with the court to strike down a content-based regulation of speech. In this case, the court invalidated a Forsyth County, Georgia ordinance that empowered the city administrator to adjust a public-speech permit fee according to the amount of hostility likely to be created by the speech. The court found that the ordinance did not provide narrowly draw, reasonable and definite standards to guide the administrator.[72] Writing for the five-person majority, Blackmun stated, "Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. "[73] Blackmun concluded that the fee may be based on the content of speech.[74]

Most recently, in the case, McIntyre v. Ohio Elections Commission,[75] the majority of the court found unconstitutional an Ohio election statute requiring political campaign literature to include the name and address of the issuer. Stevens authored the majority opinion, which Kennedy signed and which held that the requirement was a content regulation of core political speech.[76] Stevens wrote that Ohio was unable to show that its interests justified the requirement.[77]

Kennedy also voted with the court to strike down content-based regulations of expressive conduct. In Texas v. Johnson,[78] Brennan wrote the opinion for the five-member majority, which Kennedy joined and which said that the conviction of Gregory Lee Johnson for burning the U.S. flag was unconstitutional since, "Johnson's political expression was restricted because of the content of the message he conveyed."[79] Brennan wrote that the state's interests in preventing breaches of peace and preserving the flag as a symbol of nationhood did not justify a conviction based on political expression.[80]

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[69] Id., 803.
[70] Id., 798.
[71] Forsyth County, Georgia v. The Nationalist Movement, 505 U.S.---, 120 L. Ed. 2d 101 (1992).
[72] Id., 113.
[73] Id.
[74] Id.
[75] McIntyre v. Ohio Elections Commission, 514 U.S.---, 131 L. Ed. 2d 426 (1995).
[76] Id., 439.
[77] Id., 446.
[78] Texas v. Johnson, 491 U.S. 397 (1989).

In addition to signing the majority opinion, Kennedy authored a concurring opinion expressing his pain at announcing this judgment. He said,

> ...I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.
>
> With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce.... It is poignant but fundamental that the flag protects those who hold it in contempt.[81]

In this case Kennedy's libertarian philosophy seemed to supersede his conservative support of authority. Kennedy voted to strike down the flag-burning law even though the flag is a symbol of nationhood. However, as Kennedy's opinion shows, the choice was made with reservations.[82]

In another case involving content-based regulation of expressive conduct, R.A.V. v. City of St. Paul,[83] the court unanimously struck down a St. Paul ordinance proscribing the placement on public or private property of a symbol, including a burning cross, that arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. Scalia wrote the majority opinion, which Kennedy joined and which held, "The ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[84] Scalia noted that content-based regulations are presumptively invalid, citing Kennedy's concurring opinion in Simon & Schuster.[85]

In addition to taking a libertarian approach to content-based regulations of speech, Kennedy generally voted to strike down non-content based regulations or their applications that resulted in total or partial bans of categories of speech. Such bans took several forms, including: (1) seizures or licensing schemes that constituted prior restraints on speech, (2) prohibitions on speech that were broader than necessary to serve the asserted interests, and (3) bans of various types of political speech.

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[79] Id., 359.

[80] Id., 364.

[81] Id.

[82] In United States v. Eichman, 496 U.S. 310 (1990), the majority struck down a Congressional act banning the mutilation and burning of the flag for the reasons discussed in Texas v. Johnson.

[83] R.A.V. v. City of St. Paul, 505 U.S.---, 120 L. Ed. 2d 305 (1992).

[84] Id., 316.

[85] Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105 (1991).

First, Kennedy voted to invalidate what he felt was a prior restraint on speech in FW/PBS v. City of Dallas.[86] In this case, the court considered a Dallas, Texas plan to license sexually-oriented businesses. Although the court splintered among five opinions, O'Connor wrote an opinion, parts of which constituted the majority opinion. The court held that the licensing scheme was unconstitutional as enforced against businesses engaging in protected First Amendment activity.[87] Kennedy and Stevens also joined another section of O'Connor's opinion, which said that the ordinance's licensing scheme constituted an unconstitutional prior restraint because it did not provide for an effective limitation of the time of the licensing process and it did not provide an avenue for prompt judicial review of license denials.[88]

In Fort Wayne Books v. Indiana,[89] the court considered two separate issues. In case number 87-470, the court held unconstitutional the seizure of the petitioner's bookstore and its contents before an adversarial hearing to determine whether the materials were obscene.[90] White, writing for the majority which included Kennedy, said that a single copy of a publication may be seized for evidence, but the whole publication may not be taken out of circulation until a court has determined that the publication is obscene.[91]

In apparent contrast to its decision in Fort Wayne Books, the court in Alexander v. U.S.[92] held that the First Amendment does not proscribe RICO forfeitures based on the sales of obscene materials. In this case, Ferris Alexander was convicted of violating obscenity laws based on a jury's finding that materials sold by Alexander were obscene. Alexander was given a fine and a jail sentence and ordered to forfeit his bookstores because they were essential to his racketeering enterprise. Rehnquist wrote the majority opinion, from which Kennedy dissented. The opinion stated, "The RICO forfeiture order was not a prior restraint on speech, but a punishment for past criminal conduct."[93]

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[86] FW/PBS v. City of Dallas, 493 U.S. 215 (1990).
[87] Id., 237.
[88] Id., 229.
[89] Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).
[90] Id., 63.
[91] Id.
[92] Alexander v. United States, 509 U.S.--, 125 L. Ed. 2d 441 (1993).

This was one of the rare cases in which Kennedy did not join the majority of the court. Instead, he authored a sharp dissent, which was joined by Blackmun and Stevens, protesting what he felt was a prior restraint on speech. He compared the case to Near v. Minnesota, the classic case in which the court held that prior restraints were presumptively invalid.[94] Kennedy wrote,

> The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real.[95]

He continued,

> In my view, the forfeiture of expressive material here that had not been adjudged to be obscene, or otherwise without the protection of the First Amendment, was unconstitutional....The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles.[96]

Kennedy's use of terms such as "censorship," "flagrant violation," and "deplorable," made obvious his condemnation of such blanket restraints on speech.

At other times, Kennedy found that bans on speech, while not necessarily presumptively invalid prior restraints, were broader than necessary to serve the purported governmental interest.[97] In Lee v. International Society for Krishna Consciousness,[98] Kennedy voted with the majority of the court to invalidate a ban on the repetitive distribution of literature within public airport terminals. The court considered this case in concert with another case addressing a prohibition on the solicitation of funds in airport terminals[99] and referred to its opinions in that case as governing this one.

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[93] Id., 452.

[94] Id., 465. Kennedy is referring to the case of Near v. Minnesota, 283 U.S. 28, 283 U.S. 697 (1931).

[95] Id., 460.

[96] Id., 468.

[97] In Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989), Kennedy agreed with the majority of the court that the government's interest in protecting children did not justify the Federal Communications Commission's prohibition against the interstate transmission of indecent telephone recordings. Kennedy apparently subscribed to White's reasoning that measures taken to restrict the access of children to indecent phone calls--such as credit card requirements--were sufficient to serve the government's interest in protecting children.

In Butterworth v. Smith, 494 U.S. 624 (1990), Kennedy voted with the unanimous court to strike down a Florida statute prohibiting a grand jury witness from disclosing his own testimony after the term of the grand jury had ended because the statute did not serve or was not warranted by the state's interests in preserving the secrecy of the grand jury proceedings.

[98] Lee v. International Society for Krishna Consciousness, 505 U.S.—, 120 L. Ed. 2d 669 (1992).

Kennedy wrote an opinion that Blackmun, Stevens and Souter joined. He argued that airport corridors and shopping areas outside passenger security zones are public forums in which speech is entitled to protection appropriate to public forums.[100] He continued, "The Port Authority's blanket prohibition on the distribution or sale of literature cannot meet those stringent standards, and I agree it is invalid under the First and Fourteenth Amendments."[101]

In 1994, the unanimous court found unconstitutional a Ladue, Missouri, ordinance that banned homeowners from displaying on their property any signs other than identifying, for-sale, and safety-hazard signs.[102] Writing for the court, Stevens said that the court would assume *arguendo* that the city's ordinance was content-neutral.[103] Even with this assumption however, the court found the law overbroad. Stevens wrote, "Ladue has almost completely foreclosed a venerable means of communication that is both unique and important."[104] The court found that adequate substitutes did not exist for the medium of speech Ladue closed off.[105]

Although Kennedy typically struck down all kinds of bans on speech, he--along with the rest of the court--was particularly skeptical of bans on political speech. Kennedy joined the unanimous opinion of the court in his first two political speech cases. In Meyer v. Grant,[106] the court invalidated a Colorado law that prohibited payment for the circulation of initiative petitions that were used to place propositions on the ballot. Stevens wrote the unanimous opinion, stating that the law impermissibly burdened political speech and was not justified by the state's interest in protecting the integrity of the initiative process. In the second unanimous case, March Fong Eu v. San Francisco County

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[99] International Society for Krishna Consciousness v. Lee, 505 U.S.—, 120 L. Ed. 2d 541 (1992).
[100] Id., 559.
[101] Id., 559-560.
[102] City of Ladue v. Gilleo, 512 U.S.—, 129 L. Ed. 2d 36 (1994).
[103] Id., 46.
[104] Id., 47.
[105] Id., 48.
[106] Meyer v. Grant, 486 U.S. 414 (1988).

Democratic Central Committee,[107] the court struck down provisions of the California Election Code that forbade the governing bodies of political parties to endorse primary candidates and restricted the organization of political parties. Marshall wrote the opinion for the unanimous court, stating that the prohibition on primary candidate endorsements "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues."[108]

At issue in Norman v. Reed[109] were Illinois election laws that prevented a new political party from bearing an established party's name and required new parties to obtain 25,000 petition signatures in each electoral district before running candidates for county office. Souter wrote the majority opinion, which Kennedy joined and which held that the state's application of the law preventing the use of established party names was "far broader than necessary to serve the state's asserted interests" in preventing voter confusion.[110]

In general, then, Kennedy's libertarian approach to freedom of expression has involved invalidating governmental regulations of speech or their application that constituted content-based discrimination or content-neutral bans on speech. The next section will show how Kennedy's libertarian decisions are sometimes also consistent with a conservative ideology.

The Conservative Libertarian approach

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[107] March Fong Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1988).

[108] Id., 223.

[109] Norman v. Reed, 502 U.S. 279 (1992).

[110] Id., 290. In addition to voting against total and partial bans on speech, Kennedy opposed government actions that resulted in penalties or financial disincentives for truthful speech about lawfully obtained information. In Florida Star v. B.J.F., 491 U.S. 524 (1989), Kennedy voted with the court to forbid the imposition of civil damages against a newspaper for publishing a rape victim's name that was lawfully obtained from a publicly released police report.

In 1995, Kennedy voted with the majority of the court to invalidate a provision of the federal Ethics Reform Act that banned payments for appearances, speeches or articles, as applied to low-level executive-branch employees, in United States v. National Treasury Employees Union, 513 U.S. --, 130 L. Ed. 2d 964 (1995) . Kennedy's vote to invalidate this law differed from his decisions in other cases to uphold regulations supporting the authority of the government in its role as employer. However, Kennedy presumably subscribed to Stevens' argument that this case was most pertinent to speech unrelated to the employees' status as employees.

Following are examples of cases in which Kennedy's libertarian approach also supported outcomes consistent with a conservative ideology. These cases tended to uphold conservative values by furthering business interests, accommodating religion, and forwarding other aspects of the "New Right" agenda.

Kennedy's decisions in commercial speech cases, while libertarian, have tended to defer to business interests. Because business is a central element of social order in society, support for business can be said to support the social order, a conservative value.[111] In addition, ideology scholar David Spitz explained that for conservatives, support for business interests correlates with tendencies to favor the property interests of the upper classes.[112]

During Kennedy's tenure on the court, the court has accepted several cases dealing with advertising by attorneys and certified public accountants. Kennedy's libertarian votes and opinions have advanced the interests of clients in receiving commercial information and the interests of these professionals by helping them to secure clients. For example, in 1988 Kennedy agreed with the court in Shapero v. Kentucky Bar Association[113] that a state may not prohibit lawyers from soliciting business for monetary gain by sending truthful and nondeceptive letters to prospective clients known to have specific legal problems.[114]

Two years later, in Peel v. Attorney Registration and Disciplinary Commission of Illinois,[115] the court considered the constitutionality of an Illinois prohibition on attorneys advertising themselves as "certified" or "specialist." Stevens' plurality opinion, which was joined by Brennan, Blackmun, and

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[111] Kennedy is often joined in his libertarian decisions regarding commercial speech by justices thought to be more liberal, such as Stevens and Blackmun. This paper proposes that liberal justices may favor commercial speech interests for *libertarian*, rather than *liberal* reasons. This proposal is supported by the fact that in a few instances, liberal justices Brennan and Marshall took less libertarian stances toward commercial speech regulations than did Kennedy.

[112] Spitz, 33.

[113] Shapero v. Kentucky Bar Association, 486 U.S. 446 (1988).

[114] In contrast to Kennedy's libertarian approach, some of the members of the court thought to be most conservative, including Rehnquist, Scalia, and in this case, O'Connor, voted to uphold regulations on the speech of professionals to protect the integrity of the profession. This suggests that recent commercal speech cases may have implicated for Kennedy the conservative value of protecting business interests, while for the other conservatives, the cases may have implicated another conservative value: the desire to preserve the integrity of the legal and accountancy professions.

[115] Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990).

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Kennedy, held that a lawyer's true claim of certification by the National Board of Trial Advocacy was not misleading.[116]

In this case, the most liberal members of the court, Marshall and Brennan, agreed that the state may not prohibit an attorney from advertising himself as certified, but concluded that the state may enact less restrictive measures to ensure the public is not misled.[117] Kennedy came out more libertarian than Marshall and Brennan, perhaps because of a conservative appreciation for business interests.

Kennedy authored the majority opinion in Edenfield v. Fane,[118] a case addressing Florida's ban on certified public accountants' personal solicitation of clients. He began his analysis by noting that the accountant's solicitation was commercial speech protected by the First Amendment.[119] He then discussed the value of solicitation to commerce, writing,

> Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation. Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market. In particular, with respect to nonstandard products like the professional services offered by CPAs, these benefits are significant.[120]

Thus, Kennedy explains the value of such speech to the business world. While protecting free speech, Kennedy is able to advance interests of business.

Kennedy followed his discussion of the value of solicitation with legal analysis. Because solicitation is commercial speech, he explained that regulations of it "need only be tailored in a reasonable manner to serve a substantial state interest."[121] Kennedy then reviewed the Central Hudson test for regulations of commercial speech[122] saying,

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[116] Id., 106.
[117] Id., 111.
[118] Edenfield v. Fane, 507 U.S.--, 123 L. Ed. 2d 543 (1993).
[119] Id., 552.
[120] Id.

> We must ask whether the State's interests in proscribing it are substantial; whether the challenged regulation advances these interests in a direct and material way; and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.[123]

Applying the Central Hudson test, the court found that although the Board's asserted interests in protecting the integrity of certified public accountancy were substantial, the Board failed to demonstrate that its solicitation ban advanced those interests. Kennedy stated that the Board produced no evidence that personal solicitation of clients by CPAs creates dangers of fraud, overreaching, or compromised independence.[124]

Last year, in the case, Florida Bar v. Went For It, Inc.,[125] Kennedy went farther than the majority of the court to protect the advertising of attorneys. The court upheld Florida Bar rules prohibiting personal injury lawyers from sending targeted, direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The court found the ban withstood Central Hudson scrutiny.[126] Writing for the five-member majority, O'Connor stated that the Bar has substantial interest in protecting the privacy of accident victims and preventing erosion of confidence in the legal profession.[127] The court found the ban well-tailored to suit those interests.[128]

Kennedy authored the dissenting opinion, which was joined by Stevens, Souter and Ginsburg. Kennedy found the communication at issue to be more important than commercial speech, arguing that

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[121] Id., 553.

[122] This test was developed in the case Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).

[123] Id., 553.

[124] Id., 555. In another case, Banez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S.—, 129 L. Ed. 2d 118 (1994), Kennedy voted with the court to hold unconstitutional a state accountancy board's reprimand of an attorney for using truthful designations that she was a "CPA" (Certified Public Accountant) and "CFP" (Certified Financial Planner) in a yellow pages advertisement.

[125] Florida Bar v. Went For It, Inc., 515 U.S. —, 132 L. Ed. 2d 541 (1995).

[126] Id., 30.

[127] Id., 13-14.

[128] Id., 18.

"it may be vital to the recipients' right to petition the courts for redress of grievances."[129] He also protested the majority's concern that families will be offended by solicitation after their traumas, writing, "We do not allow restrictions on speech to be justified on the ground that the expression might offend the listener."[130] He called the restriction, "censorship, pure and simple."[131] Kennedy was interested in supporting the business interests of attorneys and providing information to accident victims at the same time. He wrote,

> Obscuring the financial aspect of the legal profession from public discussion through direct mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects.[132]

Thus, in every case addressing the rights of attorneys and CPAs to advertise, Kennedy supported their interests.[133] Kennedy also has supported business interests in freedom of expression cases not implicating commercial speech. In Gentile v. State Bar of Nevada,[134] the Supreme Court considered the State Bar of Nevada's reprimand against an attorney for holding a press conference to counter negative publicity against a client. The court struck down for vagueness as applied a Nevada rule restricting lawyers' extrajudicial statements to the press. However, the court found the use of a less demanding standard than that established for scrutiny of regulation of the press was appropriate to evaluating restrictions on attorneys' speech. Kennedy authored the portion of the court's opinion that found the statute overly vague, while Rehnquist authored the portion of the court's opinion that allowed the less demanding standard of scrutiny. O'Connor had the deciding vote in this case, dividing her concurring opinion between Kennedy's and Rehnquist's opinions, which each attracted three additional joiners.

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[129] Id., 33.

[130] Id., 37.

[131] Id., 39.

[132] Id., 48.

[133] In addition, Kennedy has favored freedom of expression for other commercial enterprises. In City of Cincinnati v. Discovery Network, 507 U.S. ---, 129 L. Ed. 2d 99 (1993), Kennedy voted with the majority of the court to hold unconstitutional Cincinnati's refusal to allow distribution of commercial publications in news racks on public property. Most recently, in 1995, Kennedy supported commercial interests when he joined the unanimous court in invalidating a provision of the Federal Alcohol Administration Act that forbade the inclusion of information of alcohol content levels on beer bottle labels, in Rubin v. Coors Brewing Company, 514 U. S. ---, 131 L. Ed. 2d 532 (1995).

[134] Gentile v. State Bar of Nevada, 501 U.S.1030 (1991).

The portion of Kennedy's opinion which became the opinion for the court found the Nevada rule overly vague because it allowed attorneys to speak to the press about the general nature of a defense while forbidding elaboration.[135] Kennedy stated,

> The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree....The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.[136]

Kennedy not only helped prevent the reprimand against the attorney but also supported the attorney's business interests, since the attorney's speech was made to help his client. Kennedy wrote that the lawyer "sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community."[137] What's good for the client is good for the business.

Kennedy authored another opinion supportive of business interests in the political speech case, Austin v. Michigan Chamber of Commerce.[138] In this case the court upheld a Michigan statute that prohibited corporations from using the corporate treasury for independent expenditures to endorse or oppose candidates for state office. Marshall authored the majority opinion, from which Kennedy dissented. Marshall stated that the statute was valid as applied because it was narrowly tailored to serve the state interest in preventing corruption of elections that might occur if corporations were allowed to use their vast wealth to influence outcomes.[139]

Kennedy's dissent, joined by Scalia and O'Connor, protested the majority holding, which he called "the most severe restriction on political speech ever sanctioned by this court."[140] He based his discussion largely on the rights of nonprofit corporations to political speech. Nevertheless, since the Michigan Chamber of Commerce was a nonprofit corporation, his argument supported business interests. Kennedy said it was incorrect of the court to assume that the state has an interest in equalizing the relative influence of speakers.[141] He wrote, "That those who can afford to publicize their views may succeed in the political arena as a result does not detract from the fact that they are exercising a First Amendment right."[142]

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[135] Id., 1048-1049.
[136] Id.
[137] Id., 1042.
[138] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
[139] Id., 660.
[140] Id., 699.

Kennedy gave several other reasons to declare the statute unconstitutional. First, he called the statute "content based" because it prohibited corporations from speaking on a particular subject, candidate qualifications, and discriminated on the basis of the speaker's identity.[143] He wrote, "By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for reelection." Clearly, Kennedy would protect what this particular segment of the community--the business segment--would have to say.

In addition to supporting business interests, Kennedy's libertarian decisions have sometimes resulted in outcomes that accommodate religious interests.[144] Decisions that uphold freedom of religious speech are consistent with a conservative value structure that places the church and religious institutions at the center of a positive social order.

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[141] Id., 704.

[142] Id., 705. Note that this statement is in sharp contrast to the liberal value of promoting equality.

[143] Id., 699.

[144] The first freedom of expression case in which Kennedy participated that involved religious speech was West Side Community Schools v. Mergens, 496 U.S. 226 (1990). In this case, the court found that under Congress' Equal Access Act, an Omaha, Nebraska school could not bar student religious groups from meeting on school property after hours where 30 other groups were allowed to meet. Kennedy wrote a concurring opinion that briefly recognized that the Equal Access Act must comply with the free speech clause as well as the establishment and free exercise clauses of the Constitution. However, the bulk of Kennedy's and the court's opinions in this case was devoted to the religion clauses.

Lamb's Chapel and Steigerwald v. Center Moriches Union Free School District, 508 U.S.--, 124 L. Ed. 2d 352 (1993) was the first case in which Kennedy participated that the court fully addressed the freedom of religious speech.In this case, the court considered whether the First Amendment was violated when a church was denied access to school property to exhibit a religious film dealing with family and child-rearing issues. The school denied the exhibition solely because of its religious viewpoint, which the unanimous court found unconstitutional under the free speech clause. Kennedy wrote a one-sentence concurrence, noting, "This overt, viewpoint-based discrimination contradicts the speech clause of the First Amendment," but basing the rest of his opinion on the religion clauses.

Kennedy wrote the court's majority opinion in a recent case addressing religious speech, Rosenberger v. University of Virginia.[145] In this case, the court found unconstitutional under the free speech clause the denial by the University of Virginia of a mandatory student activity fee to fund a student religious group's newspaper when the fee funded various other student publications. The court held the university to be a limited public forum.[146] Kennedy, consistent with his usual approach to content-based regulation, found the fee restriction to be unconstitutional not only because it was content-based, but also because it was viewpoint-based. He wrote:

> By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.[147] ... A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.[148]

Kennedy rejected the university's argument that discrimination was necessary because funding was scarce, saying, "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[149] At the same time, the court rejected the submission that using university funding for the religious newspaper violated the establishment clause. Kennedy wrote,

> It does not violate the establishment clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises.[150]

Instead, Kennedy argued that if the dissent's view that religious speech may not be funded by the university were to become law,

> it would require the University, in order to avoid a constitutional violation, to scrutinize the content of students' speech, lest the expression in question--speech otherwise protected by the Constitution--contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might

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[145] Rosenberger v. University of Virginia, 515 U.S. —, 132 L. Ed. 2d 700 (1995).

[146] Id., 21.

[147] Id., 22.

[148] Id., 27.

[149] Id., 30.

[150] Id., 44.

> approve."... That eventuality raises the specter of governmental censorship, to ensure that all student writings and implications meet some baseline standard of secular orthodoxy. ... Official censorship would be far more inconsistent with the establishment clause's dictates than would governmental provision of secular printing services on a religion-blind basis.[151]

O'Connor wrote a concurring opinion that largely agreed with Kennedy's analysis, but also said, "I note the possibility that the student fee is susceptible to a free speech clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees."[152] Thus, while Kennedy championed the rights of the student religious newspaper, he did not go as far as O'Connor to consider the rights of the students who pay the fee. So Kennedy led the court in a libertarian decision that resulted in the support of a religious publication.

Souter, in a dissent joined by Stevens, Ginsberg and Breyer, asserted that the University's refusal to support petitioners' religious activities is compelled by the establishment clause because the state may not fund religious endeavors.[153] Souter argued that the establishment clause's bar is controlling, so that the free speech question should not even have been reached.[154]

Also in 1995, the court held that the display of a cross on a statehouse lawn in Columbus, Ohio by the Ku Klux Klan was fully protected private religious speech, in Capitol Square Review Board v. Pinette.[155] The court rejected the argument that the proximity to the statehouse would suggest endorsement of religion.[156] Writing for the majority which Kennedy joined, Scalia critiqued Stevens' dissent, which argued that the display was prevented by the establishment clause. Scalia wrote that Stevens' opinion "exiles private religious speech to a realm of less-protected expression."[157] He continued, "It will be a sad day when this court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives...than to private prayers."[158]

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[151] Id., 46.
[152] Id., 58.
[153] Id., 79.
[154] Id., 122.
[155] Capitol Square Review Board v. Pinette, 510 U.S. ---, 126 L. Ed. 2d 636 (1995).
[156] Id., 26.
[157] Id.
[158] Id., 26-27.

Kennedy's libertarian votes have also supported outcomes in two cases that are consistent with the ideology of the "New Right," as described by Gottfried. Thus, in, Madsen v. Women's Health Center,[159] the court considered provisions of a Florida state court injunction restricting expressive activities of pro-life advocates outside of an abortion clinic. Rehnquist wrote the majority opinion, which found some of the provisions constitutional, and some unconstitutional. Kennedy joined Scalia in a concurring and dissenting opinion that would have invalidated the entire injunction, supporting the rights of the pro-lifers to protest. Outcomes favorable to pro-life supporters would be consistent with the New Right ideology, which generally opposes legalized abortion as an affront to traditional family values.

Scalia characterized the sidewalk area in front of the abortion clinic as a public forum and argued that no part of the injunction was constitutional.[160] He said the injunction was content-based, since it targeted only the speech of pro-lifers.[161] Perhaps most importantly, Scalia suggested that the court's decision in this case was dependent on the context of abortion.[162] By joining Scalia's opinion, Kennedy assumed a libertarian approach to freedom of expression and also supported the outcome consistent with the ideology of the conservative New Right.

In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,[163] Kennedy voted with the unanimous court to strike down the application of the Massachusetts public accommodation law to require private citizens who organize a parade to include among marchers a group transmitting a message that the organizers did not want to convey. The outcome of this case supported the right of a veterans' group marching in Boston to deny admittance to march in the parade to the Irish-American Gay, Lesbian and Bisexual Group of Boston. This outcome would presumably be desired by the New Right, who tend to oppose advancement of homosexual rights.

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[159] Madsen v. Women's Health Center, Inc., 512 U.S.---, 129 L. Ed. 2d 593 (1994).

[160] Id., 623.

[161] Id.

[162] Id., 620.

[163] Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. ---, 132 L. Ed. 2d 487 (1995).

Souter, writing for the unanimous court, explained that Boston's application of the statute was unconstitutional since it "produced an order essentially requiring petitioners to alter the expressive content of their parade."[164] Souter explained, "This use of the state's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[165]

In summary, Kennedy's decisions have generally incorporated a libertarian ideology, as demonstrated by his opposition to regulations that discriminate on the basis of the content of speech and regulations that result in partial or total bans of speech. At times, Kennedy's libertarian ideology has also resulted in votes for outcomes that are consistent with conservative values. Cases involving commercial speech, religious speech, the speech of a pro-life group, and the speech of a veterans group exhibited a combination of libertarian and conservative values.[166]

The Conservative Approach

Up to this point, this analysis has focused on Kennedy's libertarian approach to freedom of expression, which he used in over half of the cases in which he participated. In 32 cases, however, Kennedy voted to restrict freedom of expression. In these cases, Kennedy's reasoning was still based on the principles to which he subscribed when he favored freedom of expression. However, the outcomes in the great majority of these cases (27 of 32) were consistent with a conservative ideology. Kennedy's votes upheld laws that reflected a need for authority and order in society as well as laws that promoted family values.

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[164] Id., 28.

[165] Id.

[166] Kennedy took a libertarian approach to freedom of expression in four other cases not discussed because his opinions either did not address, or addressed only tangentially the First Amendment. These cases included: Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), in which the court ruled unanimously that a group of teachers was the "prevailing party" in a First Amendment case, so that the group was entitled to an award of attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976; Burdick v. Takushi, 504 U.S. 428 (1992), in which Kennedy wrote that Hawaii's prohibition on write-in voting was an unconstitutional abridgment of the right to cast a meaningful vote, but did not implicate the First Amendment; Rowland v. California Men's Colony, 506 U.S.---, 121 L. Ed. 2d 656 (1993), in which Kennedy argued that an association of prison inmates constituted a "person" under statutory law for the purposes of bringing suit *in forma pauperis*; and Reed v. United Transportation Union, 488 U.S.319 (1989), which addressed the First Amendment only as a basis for the statutory construction under consideration.

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Kennedy's votes that upheld laws supportive of authority and order in society came in as least three types of cases: (1) cases that supported the rights of the government as an employer, (2) cases that allowed public figures and officials to win libel suits, and (3) cases that resulted in better access to public facilities.

Although in his libertarian decisions Kennedy was quick to invalidate government regulations of private speech, Kennedy was much more tolerant of regulations imposed by the government in its capacity as employer. [167] This posture is consistent with a conservative ideology, since it tends to help maintain a functional authority in society.

In Waters v. Churchill,[168] the court considered the firing of a government employee for statements she made at work. Writing for the plurality of the court, O'Connor explained that, according to precedent, if the speech related to matters of public interest, it was protected, while if it related to complaints about the work environment, it was not protected. The court considered whether the determination of type of speech should be left to "what the government thought was said, or to what the trier of fact ultimately determines to be said."[169] O'Connor stated, "Where the government is an employer, restrictions on speech may be appropriate."[170] The plurality agreed that the determination of type of speech should be based on "the facts as the employer *reasonably* found them to be,"[171] as opposed to a jury determination.

Scalia, Kennedy and Thomas concurred, stating, "Judicial inquiry into the genuineness of a public employer's asserted permissible justification for an employment decision...is all that is necessary to avoid the targeting of 'public interest' speech."[172] Kennedy agreed with Scalia that under the First

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[167] In United States v. Aguilar, 515 U.S. ---, 132 L. Ed. 2d 520 (1995), Kennedy voted with a court that was unanimous on this point, that freedom of speech must yield to the functioning of the criminal justice system. In this case, the court considered the conviction of a U.S. District Court Judge for illegally disclosing an expired wiretap in violation of a statute. Most of the opinion was concerned with reading the statutory law, however, the court held that the statute in question should not be read to exclude disclosures of expired wiretaps to be valid under the First Amendment.

[168] Waters v. Churchill, 511 U.S.---, 138 L. Ed. 2d 686 (1994).

[169] Id., 692.

[170] Id., 699.

[171] Id., 701 (emphasis in the original).

[172] Id., 709.

Amendment, a government employer was not required to conduct an investigation before disciplining an employee for the employee's speech.

In another case addressing government control of employees' expression, Rutan v. Republican Party of Illinois,[173] the majority of the court held that low-level government employees cannot be denied promotion, transfer, recalls after layoff or consideration of application for employment on the basis of political affiliation.[174] Scalia wrote a dissenting opinion that was joined by Rehnquist, Kennedy and in part by O'Connor. He argued:

> When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, unchallenged and widespread use that dates back to the beginning of the Republic, we have no proper basis for striking it down.[175]

He further argued that government regulations of employees' expression are valid if the advantages are deemed to outweigh the coercive effects.[176] He said that the desirability of patronage is a policy question to be decided by the legislature.[177] Scalia wrote:

> In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have proceeded us, I do not consider that a significant impairment of free speech or association.[178]

Judging by his vote, Kennedy didn't either.[179]

In addition to supporting authority in cases involving the government as an employer, Kennedy supported authority by voting for case outcomes that allowed public figures and officials to win libel suits. These outcomes were consistent with a conservative regard for authority because they permitted authority figures--in these cases a political candidate, an athletic coach, and a prominent psychologist--to maintain claims for damages for injuries to reputation, despite First Amendment arguments to the contrary.

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[173] Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

[174] Id., 63.

[175] Id., 95.

[176] Id., 102.

[177] Id., 104.

[178] Id., 110.

[179] In Thornburgh v. Abbott, 490 U.S. 401 (1989), Kennedy voted to uphold regulations giving prison wardens the ability to censor incoming publications. This decision also reflected a deference to authority and order, although it did not involve the government as an employer.

The first libel case in which Kennedy participated, Harte-Hanks, Inc. v. Connaughton,[180] upheld the decision of the U.S. Court of Appeals for the 6th Circuit, which had found a Hamilton, Ohio newspaper acted with actual malice when it reported that a candidate for a municipal judgeship had used dirty tricks and bribes against an employee of the opposing candidate. The actual malice standard requires that a speaker must act with reckless disregard for the truth or knowledge of falsity if a public figure is to succeed in a libel action. Stevens wrote the opinion for the unanimous court, saying "the evidence in the record in this case, when reviewed in its entirety, is 'unmistakably' sufficient to support a finding of actual malice."[181] Thus, Kennedy and the entire court supported the reputational interests of a public figure.

In Milkovich v. Lorain Journal Co.,[182] the court held that no constitutional privilege against libel suits exists for statements labeled "opinion" that are assertions of fact. The case arose when a high school wrestling coach, determined to be a public figure, alleged that an Ohio newspaper article expressing disapproval of the coach's behavior accused him of perjury. Writing for a seven-member majority which included Kennedy, Rehnquist detailed the existing constitutional protections against findings of libel and noted, "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."[183] The court's decision not to create a privilege for opinion was a decision not to narrow the range of possible libel claims. Since in this case the decision allowed a public figure to pursue his libel suit, it supported the reputational interests of authority.

Kennedy's only substantive opinion in a libel case came in Masson v. New Yorker,[184] a case in which the court considered whether certain quotations attributed to a public figure, Jeffrey Masson, were written with actual malice and could therefore be ruled libelous. Kennedy wrote the majority opinion, which held, "A deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of New York Times Co. v. Sullivan. . . unless the alteration results in a material change in the meaning conveyed by the statement."[185]

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[180] Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657 (1989).
[181] Id., 693.
[182] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[183] Id., 21.
[184] Masson v. New Yorker, 501 U.S. 496 (1991).

The court considered whether a jury could find the six statements under examination materially altered tape recorded statements by the public figure. It found that five of six statements could be considered materially to have altered the meaning of the public figure's statements.[186] Therefore, the case was remanded for jury consideration of whether the five statements were written with actual malice. Because Kennedy and the majority refused to grant summary judgment in favor of the defendant, they allowed for a finding of libel against a public figure, once again supporting the reputational interests of authority.[187]

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[185] Id., 571. Kennedy is referring to New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[186] Id., 522-525.

[187] Kennedy also supported authority by voting to uphold generally applicable laws as applied to the media and expressive conduct. A decision to support a generally applicable law can be considered to support order in society because it reinforces consistency of application of the law. In Leathers v. Medlock, 499 U.S. 439 (1991), the court held that Arkansas' tax on cable and satellite television and related exemption of print media did not violate the First Amendment. O'Connor's majority opinion, which Kennedy joined, stated that the tax differed from others that had been struck down because it was generally applicable to the sale of tangible personal property and did not target cable television "in a purposeful attempt to interfere with its First Amendment activities." In Cohen v. Cowles Media Co., 501 U.S. 663 (1991), the court considered the question of whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of promise of confidentiality given to the plaintiff in exchange for information. White, writing the opinion for the five-member majority including Kennedy, held, "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press had incidental effects on its ability to gather and report the news."

In two cases, Kennedy voted with the unanimous court to uphold generally applicable laws as they applied to expressive conduct. In F.T.C. v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990), the court ruled unanimously that an attorney boycott organized to secure higher payment for representation of indigent criminal defendants was not automatically excepted from condemnation under anti-trust laws as expressive conduct protected by the First Amendment, since the purpose of the boycott was economic advantage.

In National Organization for Women v. Scheidler, 510 U.S.---, 127 L. Ed. 2d 99 (1994) the court considered whether a RICO (8 U.S. Code 1961-1968) action alleging a conspiracy to close down abortion clinics could be maintained without proof of economic motive. Rehnquist wrote the opinion for the unanimous court, which held that, based on statutory construction, RICO does not require a showing of economic motive by suspects. Souter wrote a separate concurring opinion, which Kennedy joined and which discussed First Amendment implications of the case. Souter explained that the First Amendment does not require reading an economic-motive requirement into RICO because such a requirement "would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling." Thus, in this case Kennedy and Souter seemed to feel that the conservative interest in preserving order was more important than the libertarian interest in advancing freedom of expression. Interestingly, the outcome of this case would tend to support a liberal interest in the right of legalized abortion. As such, it differs from the outcomes of other cases involving the expressive rights of opponents and advocates of the right to choose abortion, which tended to favor the interests of abortion opponents.However, Kennedy and Souter acknowledged the possibility that expressive rights may override RICO convictions. Souter said, "It is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case." In essence, then, Souter and Kennedy upheld the general applicability of the law,

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Kennedy made other decisions that resulted in outcomes that tended to support order in society by ensuring relatively uninhibited access to public facilities including voting polls, the post office, and public airport terminals. In Burson v. Freeman,[188] Kennedy agreed with the court that freedom of expression must give way to facilitate the exercise of the right to vote. The court upheld the constitutionality of a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign literature within 100 feet of the entrance to a polling center. Blackmun authored the plurality opinion, which stated that the statute was a content-based restriction on political speech in a public forum[189] that nevertheless withstood strict scrutiny because, "Some restricted zone around polling places is necessary to protect that fundamental right [to vote]."[190]

Kennedy authored a concurring opinion that justified his vote to uphold a content-based regulation in light of his opinion in Simon & Schuster.[191] Kennedy reiterated:

> There is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The state is not using this justification to suppress legitimate expression.[192]

His decision favored an outcome consistent with a conservative desire to maintain order at the voting polls.

In U.S.v. Kokinda,[193] the court upheld a Postal Service regulation prohibiting the personal solicitation of funds on postal property. The statute came into question after the National Democratic Policy Committee had placed a table on the sidewalk of the Bowie, Maryland post office to solicit contributions and distribute political literature. O'Connor, writing for the majority, stated that the

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but left room for challenges to it. Acknowledging the availability of a First Amendment challenge supported the interests of the pro-life protesters, who would make such a challenge.

[188] Burson v. Freeman, 504 U.S. 191 (1992).

[189] Id., 196.

[190] Id., 211.

[191] Simon & Schuster v. Crime Victims Board, 502 U.S.105 (1991).

[192] Burson v. Freeman, 214.

[193] U.S. v. Kokinda, 497 U.S. 720 (1990).

sidewalk in question was not a traditional[194] or designated[195] public forum and that therefore the statute need only meet the reasonableness standard to survive constitutional scrutiny. The court concluded that the Postal Service's long experience with solicitation demonstrates that "it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business."[196]

Kennedy did not sign the majority opinion but wrote a concurring opinion expressing his view that the postal property may be more than a nonpublic forum.[197] In this case, he recognized the interests of the Postal Service in ensuring access to its facilities, but gave more consideration to the expressive interests at stake than he did in Burson. He wrote:

> While it is legitimate for the Postal Service to ensure convenient and unimpeded access for postal patrons, the public's use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression.... It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum.[198]

Despite the fact that Kennedy found the postal sidewalk potentially to be more than a nonpublic forum, he was not opposed to the regulation.[199] After his public forum analysis, Kennedy stated that it was not necessary to determine whether the sidewalk was a public forum because he found it to be a reasonable restriction of the time, place and manner of expression.[200] He stated that the regulation was narrowly tailored, since it targeted only solicitation for payments on the premises.[201] He further argued, "The Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions."[202] In short, although Kennedy was more concerned with the exercise of rights of expression in front of the post office than he was with expression rights in front of polling booths, he still deferred to the interests of access and order in this case.

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[194] Id., 727.
[195] Id., 730.
[196] Id., 732.
[197] Id., 737.
[198] Id., 737.
[199] Id., 739.
[200] Id., 738.
[201] Id., 739.

One part of the Krishna cases[203] addressed a similar issue. As discussed previously, the court upheld the prohibition of repetitive solicitation of money but struck down the prohibition of repetitive distribution of literature within public airport terminals. In the case involving the repetitive solicitation of money, Rehnquist wrote the majority opinion, which stated that an airport terminal is not a public forum since it has not traditionally served as one and does not currently have its principal purpose the promotion of the free exchange of ideas.[204] Further, the majority held the solicitation regulation was reasonable given the state's interest in crowd control.[205]

O'Connor concurred, agreeing that an airport terminal is not a public forum[206] and stating that the regulation was reasonable given that solicitation was incompatible with the functioning of the terminals.[207]

Kennedy also concurred in the judgment, but found the airport terminals to be public forums.[208] Kennedy argued that the court's assessment of airport terminals as nonpublic forums is "flawed at its very beginning" because "it leaves almost no scope for the development of new public forums absent the rare approval of the government."[209] Kennedy said that the public forum determination should be based on "actual, physical characteristics and uses of the property."[210] He further stated that the court should recognize, "Open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property."[211] He feared that without this recognition, the public forum doctrine would not retain relevance as society changes.[212]

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[202] Id.

[203] The court considered the issues at stake in two separate cases, International Society for Krishna Consciousness v. Lee, 120 L. Ed.2d 541 (1992) and Lee v. International Society for Krishna Consciousness, 505 U.S.--, 120 L. Ed. 2d 669 (1992).

[204] International Society for Krishna Consciousness v. Lee, 120 L. Ed.2d 541 (1992), at 551.

[205] Id., 554.

[206] Id.

[207] Id., 557.

[208] Id., 559.

[209] Id., 561.

[210] Id.

In contrast to his opinions regarding expression outside polling booths and post offices, Kennedy stated:

> The Port Authority's primary argument...is that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel. The First Amendment is often inconvenient. But that is besides [*sic*] the point. Inconvenience does not absolve the government of its obligation to tolerate speech.[213]

This line of reasoning appears to run contrary to Kennedy's support of access and order in the cases discussed previously. However, if one continues to read Kennedy's opinion, it becomes apparent that his assessment of the government's "obligation to tolerate speech" does not extend to the prevention of reasonable time, place, and manner restrictions. He wrote, "The Authority makes no showing that any real impediments to the smooth functioning of the airports cannot be cured with reasonable time, place, and manner regulations."[214]

As in Kokinda,[215] Kennedy found that the regulation of the solicitation of funds was a narrowly drawn and content-neutral restriction of the time, place and manner of speech, and that it therefore could be upheld under the First Amendment.[216] He wrote, "In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress which is well recognized, and which is different in kind from other forms of expression or conduct."[217]

Thus, while Kennedy suggested that the need for access to airport terminals should not subvert freedom of expression rights, he would allow those rights to be reasonably regulated with time, place and manner restrictions. This supports conservative interests in maintaining order because it provides a constitutional way for the government to regulate speech that interferes with the functioning of the airport terminal.

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[211] Id., 562.
[212] Id.
[213] Id., 565.
[214] Id.
[215] United States v. Kokinda, 497 U.S. 720 (1990).
[216] International Society for Krishna Consciousness v. Lee, 120 L. Ed.2d 541 (1992), at 568.
[217] Id., 567.

As discussed above, several of Kennedy's non-libertarian decisions tended to forward conservative interests in authority and order. In addition, Kennedy's votes to restrict freedom of expression often supported outcomes consistent with a conservative appreciation of the traditional family. An emphasis on family values was sustained by Kennedy's decisions that (1) protected residential privacy and neighborhood tranquility, (2) protected children, (3) protected public morals, (4) supported the accommodation of religion, and (5) supported pro-life interests.

The first case in which Kennedy participated that dealt with residential privacy was Frisby v. Schultz.[218] In this case, the court upheld a Brookfield, Wisconsin ordinance completely banning picketing before or about the residence or dwelling of any individual.[219] O'Connor wrote the majority opinion, which was joined by Kennedy and which held that the ordinance was content-neutral[220] and narrowly tailored to protect the interest of residential privacy[221] because it referred only to picketing in front of a residence and left open ample alternative channels of communication.

In Ward v. Rock Against Racism,[222] the court upheld New York City's requirement to use city sound amplification in bandshell concerts in Central Park. Kennedy wrote the majority opinion, which stated that the sound-amplification guideline was narrowly tailored to serve the substantial and content-neutral governmental interest in avoiding excessive sound volume.[223] He wrote:

> It can no longer be doubted that government "has a substantial interest in protecting its citizens from unwelcome noise," City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806....This interest is perhaps at its greatest when government seeks to protect "'the well-being, tranquility, and privacy of the home,'" Frisby v. Schultz, 487 U.S., at 484...(quoting Carey v.

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[218] Frisby v. Schultz, 487 U.S. 474 (1988).

[219] The petitioners in this case had been protesting in front of the residence of a doctor who performed abortions. Thus, upholding a restriction of the picketers' speech would tend to go against the New Right support of pro-life interests. This suggests that for Kennedy, the interest in residential tranquility may override the interest in opposing abortion rights. This would be consistent with Kennedy's decision to uphold a woman's right to legalized abortion in Planned Parenthood v. Casey, 112 S. Ct. 279 (1992).

[220] Id., 482.

[221] Id., 484.

[222] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[223] Id., 803.

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> Brown, 447 U.S. 455....) but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. Kovacs v. Cooper, 336 U.S., at 86-87.[224]

Also in this case, Kennedy clarified his approach to time, place and manner restrictions on speech. He said that the government may impose reasonable restrictions of time, place, or manner of protected speech even in a public forum if the restrictions are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open alternative channels of communication.[225] "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others,"[226] he wrote. He said the regulation "need not be the least restrictive or least intrusive means" of serving the government's interest.[227] "The regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[228]

Marshall authored a sharp dissent, which was joined by Brennan and Stevens. "Today, the majority enshrines efficacy but sacrifices free speech," Marshall wrote.[229] Marshall reasoned that by failing to use the "least restrictive means" test, the majority "has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase."[230] He called New York's regulation of sound amplification an "impermissible prior restraint."[231]

Thus, Kennedy was willing to uphold the regulation as reasonable in the interests of tranquility of the neighborhood, while the more liberal members of the court found the regulation to constitute a content-based regulation and a prior restraint on speech.

Kennedy's third case involving residential privacy and neighborhood tranquillity was State University of New York v. Fox.[232] The case arose when students challenged a SUNY prohibition on company presentations in dorm rooms. Examining the prohibition as a regulation of commercial speech, the court found that a "least restrictive means" test of the regulation is not appropriate, and that instead what was required was a means narrowly tailored to achieve the desired objective.[233] Scalia wrote the majority opinion, which Kennedy joined and which said:

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[224] Id., 796.
[225] Id., 791.
[226] Id.
[227] Id., 798.
[228] Id., 800.
[229] Id., 807.
[230] Id., 806.
[231] Id., 803.
[232] State University of New York v. Fox, 492 U.S. 469 (1989).

> The governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.[234]

The court remanded the case for consideration of the overbreadth issues and validity as applied.

In addition to upholding laws that protect residential privacy and neighborhood tranquility, Kennedy voted in favor of speech restrictions designed to protect children. Usually, these cases involved restricting the freedom of child pornography or indecent sexual expression. In Massachusetts v. Oakes,[235] for example, Kennedy voted with the court to vacate a lower court's decision that a child pornography statute was overbroad. Oakes was indicted under a statute prohibiting adults from posing or exhibiting nude minors for visual representation after he took color photos of his partly nude 14-year-old daughter. Before the Supreme Court considered the case, the Massachusetts statute was amended to require "lascivious intent." O'Connor wrote a plurality opinion, which was signed by Rehnquist, White and Kennedy. The opinion held that the "lascivious intent" amendment mooted any overbreadth question,[236] and the amended statute with a more limited construction could still be applied to Oakes.[237]

The next year, in Osborne v. Ohio,[238] Kennedy agreed with the majority of the court that Ohio may proscribe the possession and viewing of child pornography in the interest of protecting the physical and psychological well-being of children and destroying the child pornography market.[239] White wrote the majority opinion, which Kennedy signed and which held that the Ohio statute was not overbroad since it is applied only to the possession or viewing of nudity that constituted lewd exhibition or a focus on the genitals.[240]

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[233] Id., 480.

[234] Id., 475.

[235] Massachusetts v. Oakes, 491 U.S. 576 (1989).

[236] Id., 582.

[237] Id., 585.However, the plurality found that a live dispute remained as to whether the former version of the statute could be applied to Oakes, so the court vacated and remanded the case for the lower court to decide that question.

[238] Osborne v. Ohio, 495 U.S. 103 (1990).

In U.S.v. X-Citement Video, Inc.,[241] the court upheld the constitutionality of the Protection of Children Against Sexual Exploitation Act,[242] which established criminal penalties for people who transported or received child pornography. Kennedy joined Rehnquist's majority opinion, which held that the act included a requirement that offenders must know they dealt in pornographic materials in which the performer was under age 18. Since the court found that the act included a requirement that the offender knew the age of the performer, a "scienter requirement," it reversed the lower court's decision that the act and conviction were unconstitutional. Thus, Kennedy voted with the court to uphold the validity of the restriction on child pornography.[243]

Kennedy's appreciation for family values extended beyond the protection of children to support government decisions to protect public morals and discourage vice. In Barnes v. Glen Theatre,[244] for example, he voted with the court to uphold an Indiana statute prohibiting public nudity as applied to nude dancing for entertainment. Rehnquist wrote the plurality opinion for this five-four decision and was joined by Kennedy and O'Connor. The opinion held that nude dancing is at the outer perimeters of First Amendment protection[245] and the statute prohibiting it should be judged under the O'Brien test for limitations on expressive conduct.[246] Rehnquist, O'Connor and Kennedy found that the statute passed the O'Brien test because, "The public indecency statute furthers a substantial government interest in protecting order and morality."[247] Rehnquist added, "Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity."[248] They found that the government interest was unrelated to the suppression of expressive activity and that the statute was narrowly tailored.[249]

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[239] Id., 111.

[240] Id., 113. However, the court also ruled that due process required Osborne's conviction to be overturned and the case to be remanded since it was unclear whether the state proved the defendant committed each element of the offense.

[241] United States v. X-Citement Video, Inc., 513 U.S.---, 130 L. Ed. 2d 115 (1994).

[242] 18 U.S. Code 2252.

[243] Kennedy also agreed to uphold a law designed to protect minors that did not involve child pornography. In City of Dallas v. Stanglin, 490 U.S. 19 (1989), Rehnquist authored the opinion for the unanimous court, which held that the First Amendment does not protect the right of 14- to 18-year-olds to associate with people outside their age group, upholding a Dallas, Texas ordinance that restricted the ages of admission to certain classes of dance halls. The court found the city's interest in promoting the welfare of teenagers legitimized the regulation.

[244] Barnes v. Glen Theatre, 501 U.S. 560 (1991).

[245] Id., 565.

In a second case related to the state's interest in protecting public morals, U.S. and F.C.C. v. Edge Broadcasting,[250] the majority of the court upheld a statute forbidding the broadcast of advertising for lotteries in a state that did not run a lottery, as applied to a North Carolina radio station. Writing for the majority, White said:

> We are quite sure that the government has a substantial interest in supporting the policy of nonlottery states, as well as not interfering with the policy of states that permit lotteries....The activity underlying the relevant advertising--gambling--implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be and frequently has been, banned altogether.[251]

Souter wrote a one-paragraph concurrence, which Kennedy joined and which stated that the restriction was constitutional as applied to Edge, but that is was unnecessary to decide whether the restriction might appropriately be reviewed at a more lenient level of generality.[252]

In Fort Wayne Books v. Indiana,[253] as described previously, the court considered two cases arising from the application of Indiana's RICO statute against distributors of obscene literature. In case number 87-614, the court held that the inclusion of obscenity violations among the predicate offenses under the RICO statute was not unconstitutional because the petitioner could not be convicted under the RICO statute without first being found guilty of violating legitimate obscenity laws.[254] White wrote the majority opinion, which Kennedy joined and which held that while RICO punishments are greater than those for obscenity violations, there is no constitutionally significant difference.[255] He wrote,

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[246] Id., 567. The "O'Brien test" is derived from the case of U.S. v. O'Brien, 391 U.S. 367 (1968), and requires (1) that the statute be within the constitutional power of the government to enact, (2) that the statute further important government interests, (3) that the government interest be unrelated to the suppression of ideas, and (4) that the incidental restriction on expression be no greater than necessary to further the stated governmental interest.

[247] Barnes v. Glen Theatre, 569.

[248] Id., 571.

[249] Id.

[250] United States and Federal Communications Commission v. Edge Broadcasting Company, 509 U.S.---, 125 L. Ed. 2d 345 (1993).

[251] Id., 355.

[252] Id., 361.

[253] Fort Wayne Books v. Indiana, 489 U.S. 46 (1989).

> It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means...that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws.... The mere assertion of some possible self-censorship resulting from a statute is not enough to render antiobscenity law unconstitutional under our precedents.[256]

Stevens, Brennan and Marshall dissented, arguing that the RICO statutes were unconstitutional as applied to obscenity.

In one case, Kennedy dissented from the court to uphold a law that supported the conservative value of accommodating religion. In Texas Monthly, Inc. v. Bullock,[257] a majority of the court ruled that a Texas sales tax exemption for religious literature violated the establishment of religion clause of the First Amendment and it was therefore unnecessary to consider whether it also violated the free press clause.[258]

Scalia authored a dissent that Rehnquist and Kennedy joined, providing that, based on the historical accommodation of religion, the tax exemption did not violate the establishment clause. Scalia reasoned:

> If the purpose of accommodating religion can support action that might otherwise violate the establishment clause, I see no reason why it does not also support action that might otherwise violate the press clause or the speech clause.... Such accommodation is unavoidably content based--because the freedom of religion clause is content based.[259]

Kennedy agreed with Scalia's analysis even though Kennedy was usually quick to consider invalid any content regulations.

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[254] Id., 57.
[255] Id., 59.
[256] Id., 60.
[257] Texas Monthly v. Bullock, 489 U.S. 1 (1989).
[258] Id., 5.
[259] Id., 44.

In Rust v. Sullivan,[260] Kennedy voted with the court to uphold parts of a Congressional act[261] designed to further the government's intent that federal funds not be used to promote abortion as a method of family planning. The act stated that federal funds would support only preventative family planning services.[262] It further specified that a fund recipient may not refer a woman to an abortion provider, even upon request. "One permissible response to such an inquiry is that 'the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion,'" the court opinion noted.[263]

The majority of the court found constitutional regulations preventing doctors who receive Title X funding from counseling or referring patients for abortion. Writing for the majority, of which Kennedy was a part, Rehnquist stated, "We have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the government refusing to fund activities, including speech, which are specifically excluded from the scope of the project fund."[264] Rehnquist stated that the regulations "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."[265] He continued, "The general rule that the government may choose not to subsidize speech applied with full force."[266] So Kennedy's vote in this case seemingly supported the family value of limiting government promotion of abortion as a family planning alternative.

In summary, Kennedy's non-libertarian decisions tended to support outcomes consistent with a conservative ideology. His votes often promoted authority and order in society, especially in cases involving the rights of the government as an employer, libel of public figures, and access to public facilities. Kennedy's decisions also tended to support family values. Accordingly, he upheld regulations when the government's asserted interest involved maintaining residential privacy or neighborhood tranquility, protecting children, or protecting public morals. In addition, he voted in one case to restrict freedom of expression to support the accommodation of religion and in another to restrict freedom of expression to serve the government's intent that federal funds not be used to promote abortion as a family planning alternative.

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[260] Rust v. Sullivan, 500 U.S. 173 (1991).
[261] 42 U.S. Code 300-300a-41.
[262] Rust v. Sullivan, 178-179.
[263] Id., 180.
[264] Id., 195.
[265] Id., 196.
[266] Id., 200.

Exceptional Cases: The Liberal Approach

As discussed, Kennedy's approach to freedom of expression cases was libertarian in the majority of cases. When he voted to restrict freedom of expression, his votes were usually consistent with conservative values. However, in five cases Kennedy voted to restrict freedom of expression where the outcome of the case did not necessarily support conservative values. In three of the five cases, Kennedy voted with the unanimous court to uphold restrictions on speech that worked to discourage racial and sexual discrimination. Kennedy's votes in these cases could not be considered libertarian, since they supported restricted freedom of expression. And the outcomes of the cases tended to support a liberal, rather than a conservative interest in promoting equality in society. Two other cases might also be considered exceptions to Kennedy's general pattern of freedom of expression jurisprudence. However, one of these cases reflected Kennedy's consistent view of the correct use of intermediate-level scrutiny.

In the first of the discrimination cases, New York State Club Association v. City of New York,[267] the court considered a New York City law that forbade discrimination by most clubs with 400 or more members but did not apply to distinctly private clubs, benevolent orders, or religious corporations. White wrote the opinion for the court, which held that the law was not facially invalid because it could be applied in a constitutional manner.[268] O'Connor wrote a concurring opinion, which Kennedy signed, "to note that nothing in the court's opinion in any way undermines or denigrates the importance of any associational interests at stake."[269] O'Connor also pointed out the significant government interest in discouraging discrimination, saying, "The Court reaffirms the 'power of states to pursue the important goal of ensuring nondiscriminatory access to commercial opportunities in our society.'"[270]

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[267] New York State Club Association v. City of New York, 487 U.S. 1 (1988).
[268] Id., 12.
[269] Id., 18.

Two years later, in University of Pennsylvania v. Equal Employment Opportunity Commission,[271] the court ruled unanimously that the University of Pennsylvania did not enjoy a First Amendment privilege against disclosure of peer review materials relevant to charges of racial or sexual discrimination in the tenure process. Blackmun's opinion, which Kennedy and the entire court joined, noted that Congress had extended the Equal Employment Opportunity Act to education as a "considered response to the widespread and compelling problem of invidious discrimination in educational institutions."[272]

In Wisconsin v. Mitchell,[273] the unanimous court upheld a Wisconsin statute used to enhance a prison sentence for aggravated battery when the victim was selected based on race.[274] The court found the statute not aimed at protected speech, but at conduct.[275] Rehnquist wrote the court opinion, which Kennedy signed and which stated, "The Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."[276]

Finally, in two other cases Kennedy voted with the majority of the court to uphold restrictions in what might be considered exceptions to his general libertarian-conservative jurisprudence.[277] However, the first of these cases was consistent with Kennedy's use of the "intermediate scrutiny" standard to review restrictions on freedom of expression.

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[270] Id., 18. O'Connor is quoting Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[271] University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990).

[272] Id., 190.

[273] Wisconsin v. Mitchell, 508 U.S.---, 124 L. Ed. 2d 436 (1993).

[274] Id., 436.

[275] Id., 444.

[276] Id., 447.

[277] Kennedy used a non-libertarian ideology in one additional case not discussed in the the text, Renne v. Geary, 501 U.S. 312 (1991). In this case, the court was faced with a challenge to a provision of the California constitution that prohibited a political party from endorsing or opposing a candidate for non-partisan office. Kennedy wrote the majority opinion, which held the issue nonjusticiable because there were serious doubts about the standing of the respondents, respondents failed to demonstrate a live dispute, and "the record contains no evidence of a credible threat that (the provision) will be enforced, other than against candidates in the context of voter pamphlets."

However, White argued in a dissenting opinion that the case was justiciable and the provision was constitutional, while Marshall and Blackmun found the issue justiciable and the provision overbroad.

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In the first of these cases, Turner Broadcasting v. F.C.C.,[278] Kennedy authored the majority opinion. In this case, a highly divided court held that the intermediate-level scrutiny was the appropriate standard by which to evaluate provisions that required that cable television "must carry" local broadcast stations.[279] This decision was not truly libertarian, since it used only an intermediate standard to judge a restriction on the speech of cable operators. It also appeared to be more consistent with liberal than conservative values, since it recognized the state's interest in equalizing the opportunity of speakers to convey their messages.

Kennedy reasoned that laws that single out the press are always subject to at least some degree of heightened First Amendment scrutiny.[280] He stated that regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.[281] He found that the must-carry rules, as they required cable operators to carry full- power broadcasters, were unrelated to the content of speech.[282] He said that the law was based not on the content of broadcast television programs but on "the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."[283] However, Kennedy noted that the government still bears the burden of showing that the law does not burden more speech than is necessary to further the government's interest.[284] Because the court was unable to conclude that the government has met that burden, it ruled that the District Court erred in granting summary judgment in favor of the government and remanded the case for further proceedings.[285]

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[278] Turner Broadcasting System, Inc. v. Federal Communications Commission, 129 L. Ed. 497 (1994).
[279] Id., 530.
[280] Id., 517.
[281] Id.
[282] Id., 518.
[283] Id., 528.
[284] Id., 532.
[285] Id., 534.

Blackmun and Stevens each wrote concurring opinions, Blackmun emphasizing that it is important to defer to the predictive powers of Congress[286] and Stevens arguing that the must-carry provisions should be affirmed.[287]

O'Connor wrote an opinion concurring in part and dissenting in part, which was joined by Scalia, Ginsburg, and in part by Thomas. O'Connor parted ways with Kennedy's majority opinion because she reasoned that the statute's "preference for broadcasters over cable programmers is justified with reference to content."[288] She would have the court use strict scrutiny to analyze the must-carry provisions[289] and accordingly reverse the lower court's grant of summary judgment in favor of the government.[290] Ginsburg's separate concurring and dissenting opinion expressed much the same views as O'Connor's.

This case represented an exception to Kennedy's rule that content-based regulations are not allowable. Although Kennedy refused to recognize the must-carry provisions as content-based, four members of the court argued that they were. It also represented an exception to his general tendency to uphold restrictions on speech only when the outcomes were consistent with conservative values. Although the court remanded the case for further consideration, it found intermediate scrutiny an appropriate standard to review the restrictions, thus supporting the liberal goal of equalizing access to the marketplace of ideas. However, Kennedy's opinion in this case was consistent with his opinions in Ward v. Rock Against Racism[291] and U.S. v. Kokinda,[292] which also provided that for content-neutral regulations, only intermediate-level scrutiny is required.

In Lehnert v. Ferris Faculty Association,[293] a majority of the court agreed that unions may not include in non-union employees' service fees, fees for: (1) a "Preserve Public Education" lobbying program, (2) parts of a magazine connected with the education program, (3) parts of the magazine dealing with litigation not related to the bargaining unit, and (4) public relations activities to enhance the reputation of the teaching profession.[294]

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[286] Id.
[287] Id., 535.
[288] Id., 539.
[289] Id.
[290] Id., 544.
[291] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[292] U.S. v. Kokinda, 497 U.S. 720 (1990).
[293] Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

The court splintered among four separate opinions as to the rest of the permissible charges. Kennedy took an intermediate stance, finding it permissible under the First Amendment to charge non-union members for strike preparation activities because, in his view, such expenses were indistinguishable from other collective bargaining expenses.[295]

This case represented another exception to Kennedy's general jurisprudence. His opinion was not libertarian, since he permitted regulation of employees' speech to stand. Neither was it consistent with conservative values, since it supported the functioning of a union, typically a liberal position. In addition, by arguing against a reliance on categories, Kennedy seemed to contradict his own categorical strategy for evaluating regulations of speech, as outlined in Simon & Schuster.[296]

In short, the "exceptions" to Kennedy's regular freedom of expression jurisprudence included three cases advancing the liberal value of non-discrimination, one case consistent with Kennedy's usual application of intermediate scrutiny, and another case consistent with the liberal interest in supporting unions.

DISCUSSION AND CONCLUSION

On balance, Kennedy has conformed to a libertarian ideology with respect to freedom of expression, voting in 39 of 73 cases to strike down regulations on speech. His jurisprudence has invalidated content-based regulations of speech and content-neutral bans on speech. When Kennedy departed from the majority of the court, it was generally (six of eight cases) in a libertarian direction.[297] In a minority of cases, however, he has voted and written to sustain regulations of speech.

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[294] Id., 573.

[295] Id., 563.

[296] Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105 (1991).

[297] Kennedy's opinions in two of his dissents favorable to freedom of expression were founded in reasoning not based on the First Amendment guarantee. In Burdick v. Takushi, 504 U.S. 428 (1992), Kennedy dissented against the court's decision to uphold Hawaii's prohibition on write-in voting, but based his decision on the right to vote, rather than freedom of expression. In Rowland v. California Men's Colony, 506 U.S.—, 121 L. Ed.

Almost all of the decisions in which Kennedy has voted to uphold regulations have resulted in outcomes consistent with a conservative value system. Apparently, Kennedy's description of a justice's role before the American Bar Association in 1992 applies to himself. Kennedy said,

> We, of course, are bound by the facts, the law, the rules of logic, legal reasoning and precedents....But we are also bound by our own sense of morality and decency.... We must never lose sight of the fact that law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be.[298]

Kennedy seems to have been "bound by the law," in his libertarian decisions. As he wrote in his concurrence in Texas v. Johnson, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[299] But in addition, Kennedy seems to be bound by his "sense of morality and decency" in many of his conservative decisions.

Kennedy was often appreciative of libertarian and conservative ideologies, but not generally of the liberal ideology. True to a conservative appreciation for authority, Kennedy has upheld the regulations of speech imposed by the government in its capacity as employer.[300] He has also tended to favor regulations of obscenity, indecency, and pornography, as long as they did not constitute prior restraints.[301] And Kennedy was not favorable to libel defendants.

As lawyer Lawrence Friedman argued in his analysis of Kennedy's jurisprudence on freedom of expression during his first several terms, Kennedy may have changed his attitude toward freedom of expression in 1992. Friedman argued that Kennedy's decisions in Texas v. Johnson[302] and Lee v. International Society for Krishna Consciousness[303] reflected a move away from the court's conservative

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2d 656 (1993), Kennedy dissented against the court's decision that an association was not a "person" for purposes of proceeding *in forma pauperis* in court. However, he based his decision on the reading of statutory law.

[298] Quoted in Reuben, 35.

[299] Texas v. Johnson, 491 U.S. 397 (1989), at 421.

[300] See, e.g., U.S. v. Aguilar, 515 U.S. —, 132 L. Ed. 2d 520 (1995); Rutan v. Republican Party of Illinios, 497 U.S. 62 (1990); and Waters v. Churchill, 511 U.S.—, 128 L. Ed. 2d 686 (1994).

[301] See, e.g., Massachusetts v. Oakes, 491 U.S. 576 (1989); Osborne v. Ohio, 495 U.S. 103 (1990); and U.S. v. X-Citement Video, 513 U.S.—, 130 L. Ed. 2d 372 (1994).

[302] Texas v. Johnson, 491 U.S. 397 (1989).

[303] Lee v. International Society for Krishna Consciousness, 120 L. Ed. 669 (1992).

agenda.[304] Indeed, Kennedy's favorableness toward freedom of expression increased from 49% in his first four terms on the court to 65% in his past four. However, while this move reflects an increasingly libertarian ideology, it does not necessarily support Friedman's theory that Kennedy moved away from a conservative ideology. As discussed, conservatism can be compatible with libertarianism, and in Kennedy's approach to freedom of expression, it often is.

Kennedy's contribution to the court in the area of freedom of expression, then, has been to provide another vote for moderate libertarian and conservative decisions. Because he dissented from the court's opinion in only eight of 73 cases, Kennedy has contributed to the modern meaning of freedom of expression by furthering through his votes with the majority the modern court's libertarian and conservative agendas. That is to say, Kennedy has neither doggedly pushed freedom of expression in a libertarian direction, nor attempted to constrain it. Rather, he has forwarded the central position between the ideological extremes of the court.

Because Kennedy dissented from the majority of the court so rarely, and because his favorableness toward freedom of expression approximated that of the court, analysis of his jurisprudence on freedom of expression suggested a picture of the whole court's approach to freedom of expression since 1987. The Rehnquist Court voted in a majority of cases to advance freedom of expression by striking down laws that discriminated on the basis of the content of speech and laws that censored speech. When the court upheld restrictions on freedom of expression, the outcomes of cases were usually consistent with those desired by a conservative value system. When Kennedy dissented from the court, he most often voted to advance freedom of expression. Therefore, the court as a whole has not been quite as supportive of the right as has Kennedy.

Overall, freedom of expression libertarians may be reassured that the Rehnquist Court as a whole appears to be moving in a slightly more libertarian direction. The court's favorableness toward freedom of expression claims increased from 47% of the cases in 1988-1991 to 53% in 1992-1995. In addition, Kennedy, who may indeed render determining votes in five-four cases, appears to be headed in a more libertarian direction. However, even with a move in the libertarian direction, if recent trends continue, the court will continue to uphold restrictions on speech consistent with a conservative ideology.

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[304] Friedman, 247.

Defending the News Media's Right of Access to the Battlefield

by

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Abstract

This paper examines the arguments pertaining to whether there is a limited right of access for the media to gather information on battles being waged in places which are normally open to the public in peacetime. The military banned unescorted reporters from covering forces deployed for Operations Desert Shield and Desert Storm to defend Saudi Arabia and liberate Kuwait. This ban lead to criticisms of the coverage of military operations as more of what the government "wanted people to see" than open reporting. While access was better than Operation Urgent Fury, where reporters were totally barred from covering the initial assault into Grenada, it still lacked the more open opportunities that reporters had in Vietnam and previous military conflicts. The body of cases upholding the right of access for media to courtrooms provides strong support for defending a limited right for the media to be present on the battlefield as well. The three-pronged test offered by the court in *Globe Newspapers v. Superior Court* provides an effective framework for supporting such access. The U.S. Supreme Court's ruling defends the media's right to be present to gather information in (a) places that have been historically open to the public, (b) places where the press' presence serves "a significant role in the functioning of the judicial process and the government as a whole" and (c) where there is no compelling, narrowly tailored interest to justify excluding them. Judge Leonard Sands ruled in the *Nation* case that there probably is a limited right of access for the media to some military scenes, but was unsuccessful in his attempts at obtaining recommendations for a better system from the plaintiffs protesting press restrictions during the Persian Gulf Conflict. Therefore, this paper also addresses recommendations offered by several researchers and the author for providing improved access for the media to cover military operations.

Introduction

"It was the best of coverage, it was the worst of coverage." (Sherman, 1992) For Assistant Secretary of Defense for Public Affairs Pete Williams and the many public affairs personnel involved in providing support to the media, Operations Desert Shield and Desert Storm represented "the best war coverage we've ever had." (Williams, 1991)

Numerous news executives and correspondents, however, have preferred to describe the handling of media during the last war as manipulative and harmful to the democratic process.[1] Michael Getler, assistant managing editor for foreign news at the *Washington Post*, argued in a counter-editorial appearing with the Williams piece that "censorship by delay..., death by briefing..., blacking out the ugly parts... and leakproof pools..." left the public with the pictures that the military wanted them to see. (Getler, 1991)

An examination of the major military campaigns since Vietnam reveals a pattern of media protest over restrictions imposed by the Defense Department upon news gathering, followed by government inquiries and seminars to improve media-military relations, culminating in a policy that seems to promise enhanced access for journalists to future campaigns.

Access for journalists to military operations has certainly improved since Operation Urgent Fury when reporters were totally barred from Grenada until the third day of the campaign (Engber, 1985). However, Operation Desert Storm did not provide correspondents the access they felt was necessary to adequately cover the Persian Gulf War. Though journalists were allowed to cover the operation from its initial stages, they felt their coverage was hamstrung by military escorts and unduly censored by the security review required before pool stories were filed from the battlefield.(Arledge et al., 1991)

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[1] A report submitted by executives from 17 major news organizations to Defense Secretary Dick Cheney complained that the pool system made it impossible to tell the public the full story of the war in a timely manner.

Only two cases have specifically addressed the media's right to cover military campaigns.[2] However, a growing number of rulings involving access to courts have held that a limited right of access to public places, especially those where the public may observe the functioning of its government, is incorporated in the First Amendment. Therefore, this paper will examine the following questions:

- Is there a limited right of access to military operations?
- Does security review constitute unlawful prior restraint?
- What recommendations can be made to improve the coverage of military operations?

I. Discussion of the limited right of access

Timothy Dyk observes that while the Supreme Court has yet to afford protection under the First Amendment for newsgathering, the justices have acknowledged in *Branzburg v. Hayes* that "without some protection for seeking out the news, freedom of the press would be eviscerated." The beginnings of that protection can be seen in the limited right of access established for reporters covering courtrooms in *Richmond Newspapers, Inc. v. Virginia*.[3] Dyk quotes Justice Powell's opinion in *Branzburg v. Hayes*[4] to argue that it is appropriate for the press to enjoy a recognized right of access to information in an era of more powerful government so that it may "bare the secrets of government and inform the people." (Dyk, 1992)

Dyk argues that three factors differentiate the press from the public in areas of access.

- First, the press serves important purposes that public presence only promotes remotely, if at all. The general public cannot take time to attend every trial but can assume the press will raise the alarm when possible improprieties arise in the legal process. Likewise, civilians may flee from hostilities when military force threatens their safety, but they can be served by the local media who remain or those who travel there to observe the conflict.

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[2] See *Flynt v. Weinberger*, 762 F. 2d. 134 (D.C. Cir. 1985) and *Nation Magazine v. United States DOD*, 762 F. Supp. 1558 (S.D.N.Y. 1991)

[3] See 448 U.S. 555 (1980)

[4] See 408 US 655 (1972)

- Second, the public's presence at some places may create a greater potential for disruption, justifying the press in acting as its surrogate.[5]
- Third, the press performs an important "sifting" function, helping officials provide information the public cannot access directly without sacrificing secrecy.(i.e. off-the-record interviews, confidential documents, restricted areas, etc.)

A significant factor in the *Richmond Newspapers* case was the acknowledgment of the press' right of access despite the fact that prosecuting and defense counsels had agreed to exclude the press to protect the defendant's rights. Though the defense counsel had not wanted extensive coverage of "who testified to what," the court held that "without publicity all other checks are insufficient: in comparison of publicity, all other checks [on government] are of small account...whatever other institutions might present themselves in the character of checks would be found to operate as cloaks rather than checks..."[6] This language is important to consider in light of the government's position that it has compelling interests as to what information is reported during the battle.

Another crucial point from the *Richmond Newspapers* ruling was the correlation of the right of assembly as supportive of the press' right of access. The opinion stated, "People assemble in public places not only to listen, observe and learn...indeed, they may [assemble] for any lawful purpose."[7] Chief Justice Burger described courts as places where the people and the press normally have a right to be present, and where their presence has "enhanced the integrity and equality of what takes place." Reasonable restrictions upon access to courtrooms were recognized in the rule, such as providing preferential seating for the media when the room's capacity was insufficient for all who wanted to attend.

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[5] See *United States ex rel. Orlando V. Fay*, 350 F. 2d. 967 (1965) where press was allowed access but public omitted from court to prevent disruptive outbursts.

[6] Justice Burger, quoting from Jeremy Bentham, 1 J. Bentham, Rationale of Judicial Evidence, 524 (1827)

[7] Quoting from J. Stone opinion in *Hague v. CIO*, 307 U.S. 496, 519 (1939)

Burger believed that shocking crimes bring out the urge to protest and that an open court process serves an important prophylactic purpose to vent community concerns, hostility and emotion. Without such awareness that society's responses have begun, he believed the frustrated might seek "self-help" in violent protest. He also stated that it would be difficult for him to imagine any aspect of government where the people would have a higher concern than the conduct of their criminal courts. War reporting may also serve to help assuage fears about whether lives are being lost needlessly, to prevent violent anti-war protests and to allow the people to participate in the political processes involved.

A report from the Freedom Forum regarding military-media relations stated that no right of access to the battlefield has been stated by the court (Aukofer and Lancaster, 1995), but Burger's opinion in *Richmond Newspapers* noted the ruling in *Bridges v. California*[8] that said the First Amendment,"... must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

In applying the dicta from *Richmond Newspapers*, the court in *Globe Newspapers v. Superior Court*,[9] devised a three-pronged test to determine whether the press should be granted a limited right of access to the place in question. The test considers the following aspects:

- Is the place in question one which has been historically open to the public?
- Does the press play a significant role in the functioning of the process in question?
- Is the government's denial based on a compelling interest that is narrowly tailored?

Therefore, the following subsections will address each of these tests as they apply to the coverage of military operations.

A. *Have military operations been historically open to the public?*

Boydston, Engber, Mensore, and Steger have chronicled a concise history of defense reporting in their studies. Early American newspapers did not have reporters and relied heavily upon letters from soldiers to report the events of the Revolutionary War and the War of 1812. War correspondents did not emerge until the Mexican-American War. Reporters covering the latter campaign were allowed to ride along with General Zachary Taylor on U.S. Army horses. Unlike their Persian Gulf counterparts, the reporters accompanying Taylor had no official restrictions, resulting in extensive coverage of the campaign. Civil War journalists, though occasionally banished by some commanders from their camps, were generally provided liberal access in most cases and often received passes to visit combat zones. (Kenealey, 1992)

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[8] 314 U.S. 252, 253 (1941)
[9] See 457 U.S. 596 (1982)

In World War I, reporters could visit the front lines unescorted and accompany troops when they charged from their trenches into battle. World War II also afforded many opportunities for journalists to travel with U.S. and allied forces. The 2,000 journalists covering the various fronts were able to accompany troops on bombing missions, amphibious assaults--some even parachuted with airborne forces on D-Day at Normandy. (Kenealey, 1992)

The broadest access was provided in Vietnam, where transportation in helicopters and fixed-wing aircraft was often available to help reporters cover the actions of U.S. forces. Journalists could generally hitch a ride in an aircraft as easily as their World War II counterparts could obtain a ride in a jeep. (Kenealey, 1992) The official U.S. policy was to promote "maximum candor and disclosure consistent with the requirements of security." Dealings with journalists by government sources were expected to be "effective and responsible." (Hammond, 1988)

Operation Urgent Fury in Grenada marked a historic break in defense coverage. A total ban on press access was maintained for the first two days of the invasion which began on Oct. 25, 1983. (Engber, 1985) Secretary of State George Shultz told the media they had been excluded because they could no longer be trusted. Shultz argued that the media were "no longer on our side." (Kleinberg, 1991) A pool of 15 journalists was flown by the military to the island on the third day, but unrestricted access did not begin until the airport was reopened on Nov. 7. Magazine publisher Larry Flynt filed suit over the exclusion of his reporter and other journalists from the initial assault, but the quick end to the operation caused the case to be dismissed as moot.[10]

Chairman of the Joint Chiefs of Staff General John W. Vessey, Jr. formed the Sidle Panel to examine the issues raised by the media after the Grenada invasion. The panel was chaired by Major General Winnant Sidle, U.S. Army (Ret.), who served as the chief of the Military Assistance Command Vietnam's Office of Information in 1967. The panel of former journalists and military officials provided the following recommendations on media access for military operations:

- Commencing the planning for the support of journalists to accompany U.S. forces concurrently with operational plans.
- Develop an accreditation system.
- Create a press pool system that would allow a minimal number of reporters to accompany U.S. contingency forces and ensure coverage where it might not otherwise exist.

All major news organizations readily accepted the recommendation, with the exception of *Time* magazine, which later acquiesced for fear of being excluded from the next major military operation. (Jacobs, 1992) Pools were not used, however, during the next major military operation when the U.S. conducted air strikes on Libya in 1985. Media protests were answered by the Defense Department with the comment that "Sidle doesn't commit us to anything." Pools were used to cover the Dec. 19, 1989 invasion of Panama, but with highly unsatisfactory results from the media's perspective. (Jacobs, 1992) The pool arrived in Panama five hours late and was sequestered at Howard Air Force Base. Secretary of Defense Dick Cheney delayed activating the pool to prevent possible security breaches. Cheney also canceled Army plans to form a local pool out of media already in Panama to cover the first hours of the assault. (Hoffman, 1990)

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[10] See *Flynt v. Weinberger, 762* F. 2d. 134, 135

Rather than expose the press to combat operations, the pool received two briefings from embassy personnel who gave the reporters background information on the operation's official justifications, but lacked any information on the battle. The first pool pictures and video were described in the *New York Times* as "nothing short of an Army recruiting film." (Bochlert, 1990) The Pentagon allowed twelve chartered flights of media to fly into Panama on Dec. 21 and 22, but the 300 journalists only further overwhelmed military public affairs personnel. It was not until Dec. 23 that the additional reporters were afforded any opportunity for coverage. Once again, a review panel was formed that found flaws with the planning. Williams held meetings with media representatives in Washington, D.C. that apparently convinced the major news organizations that access would be better the next time. Therefore, no one in the news media monitored what efforts the military was actually making to improve conditions for reporting the next campaign. (Comballes, 1995)

Journalists from the DOD National Media Pool were able to accompany airborne forces making the initial entry into Saudi Arabia for Desert Shield. Once the Saudi government eased entry restrictions for Western journalists, their numbers soon grew and averaged 800 journalists at any one time. (Sherman, 1992) Though media were allowed in with the initial stages of the operation, the Persian Gulf War was still seen as a departure from previous wars. (Kenealey, 1992)

The military believed that it was providing excellent coverage by allowing the media to visit ships, ride in planes, and travel aboard a variety of armored vehicles during the coverage before the war began. (Sherman, 1992) Critics cite interference, however, by escorts who stepped in front of the camera to block shots, finished sentences or completely answered some questions for troops being interviewed. "They made it clear that GIs risked hell if they spoke their mind." (Arledge et al., 1991)

The battles during all of the aforementioned wars were mainly fought in places that are normally open and available to the public (i.e. beaches, city streets, forests etc.) It is only when the places become a battlefield that access comes into question. (Jacobs, 1992,) Associated

Press correspondent John King slipped into the town of Khafji after being frustrated over the lack of pool information on the fighting between U.S. Marine forces and Iraqis. Though the fighting took place in what is normally a resort town, he was detained later by Saudi troops who told him that the Americans had encouraged their government to pull a few visas to make a point about non-pool media trying to visit the front unescorted. (Kenealey, 1992)

The pool reporters did not make it in to Khafji until 18 hours after the battle started. The best accounts of the fighting were credited to a couple of French television crews and a British team operating outside the pool. (Mensore, 1992) When the media discovered on Jan. 9, 1991 that pools would be used to cover the battlefield, print and broadcast executives attacked the DOD restrictions as "needlessly restrictive" and an "objectionable attempt at censorship." (Lewis, 1991). Pool coverage allowed 161 reporters to accompany U.S. forces during the ground war. Williams contrasts such access to the 27 journalists who were able to land with Allied forces on D-Day in Normandy. (1991) Such a comparison, however, only denotes one beachhead in an entire theater of operation. The 161 reporters in Desert Storm were attempting to report on a much larger force covering a much wider area.

As this review shows, the American press had for more than a century before Grenada been afforded open access to the battlefield. Such a long history of access should surely provide an affirmative answer to the first of the three *Globe* tests to justify the media's access. Those who would argue against this right usually rely upon previous access cases such as *Pell v. Procunier.*[11] The media in this case complained that it was unfair to deny them the right to visit prisons and interview the inmates they picked. A right of access was denied because the prison administrators effectively argued that prisons were not places historically open to the public, and that the media celebrity afforded some inmates had created disciplinary problems. (Jacobs, 1992)

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[11] 417 U.S. 817, 828

The key to distinguishing between previous access cases lies in whether such places have been open to the public. Cases that have gone against the media have dealt with places where the public has not historically been afforded access. Therefore, arguments to defend a right to visit such institutions would fail the first of the *Globe* tests. Battles, on the other hand, are usually waged in open areas and the media only report the violence that would happen regardless of their presence.

B. *Does the press play a significant role in the functioning of the process?*

Engber's analysis of the press restrictions during the Grenada invasion said, "Few people would argue that war is another of government's most critical functions. War threatens economic well-being, freedom and life itself as profoundly as lawlessness. The decisions by the United States government regarding how war is waged will affect the lives of every American." (1985) Besides American lives, the public also has national interests, prestige, risks of escalation and considerable resources at stake. (Cross and Griffin, 1987)

General Dwight D. Eisenhower, Supreme Allied Commander for the forces in Europe, made similar comments during World War II. While he believed that supporting coverage by journalists costs the military, he also thought it was worth the price to convince the public that no attempt was being made to conceal error or stupidity. (Kenealey, 1992) At Normandy, the Associated Press' Don King was told by the commander of an assault unit he was to accompany that, "We are ready to help you...The people at home won't know what is happening unless you are given information and I want them to know." (Cross and Griffin, 1987) Additionally, military personnel have long been taught the writings of Clausewitz that not only affirm that war is a means of achieving policy, but also discuss the futility of trying to divorce the martial process from its political aspects. (Aron, 1983)

Since the public cannot be present during these campaigns, the press clearly acts as a surrogate for the people. In the *Press Enterprise II*[12] case, it was ruled that the absence of a jury made the importance of public access to the trial more significant. The opinion cited *Richmond Newspapers* in ruling, "People in an open society don't demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." The *Press Enterprise* court described the value of openness as providing people not in attendance with the confidence that standards are being followed and that deviations will become known.

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[12] 478 U.S. 1 (1986)

The *Nation* court cited the need for an informed citizenry in acknowledging that the press has a right of access in certain situations. It also affirmed that the Supreme Court had been generous in upholding the public's right to know about the functioning of its government. In concluding the press had at least some right of access to military operations, the court emphasized the press' checking function against abuses of government.

The court opinion in *Mills v. Alabama*[13] describes the press as a "powerful antidote to any abuses of power by government and a constitutionally chosen means for keeping officials elected by the people responsible to all of the people whom they were elected to serve. (Cross and Griffin, 1987) Justice Black in *New York Times v. United States*[14] also opined that, "...paramount among the responsibilities of a free press is the duty to prevent any government from deceiving the people and sending them off to die of foreign fevers and foreign shot and shell (Boydston, 1992)

In upholding the right of access by the courts to criminal trials, the Supreme Court stated that without the media the only information about the government would come from the government itself. (Kenealey, 1992) If a U.S. Air Force major had not confided in the media covering Vietnam, the American public might not have discovered that a secret air campaign had been conducted against targets in Cambodia despite repeated U.S. government claims for more than a year that the other country's neutrality had been respected. (Navasky, 1991) The government was the only source of combat information during the first two days of the Grenada invasion and for most of the campaign in Panama.

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[13] 384 U.S. 214 (1966)
[14] See 403 U.S. 713 (1971)

As for Desert Storm, *Newsweek* correspondent Patrick Sloyan argues that the pools did not provide the public, or even the military, a complete and accurate view of what transpired on the battlefield.

> "When I found out about the 1st Mechanized Division's two-day effort to bury Iraqi casualties, it was news to Colin Powell. When 24 Americans were killed by friendly fire during the ground war, Norman Schwarzkopf did not find out about it until May when families and what they call the 'buddy network' starting getting feedback." (Sloyan, 1992)

Finally, when the U.S. Senate passed a resolution to abolish the press restrictions in Grenada, they noted that a free press was an "essential feature of our democratic society of government" and recognized its historic role in "covering conflicts involving United States armed forces."[15] Given such official recognition, it should only remain to see if there is a compelling government interest that would satisfy the *Globe* court's test for denying the media a limited right of access.

C. *Does the government have a compelling, narrowly tailored interest to justify denial of the limited right of access?*

The military has cited three interests for justifying its desires to control media access to the battlefield:

- The logistical burden of trying to support and protect thousands of media
- Morale
- Operational security (Jacobs, 1992)

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[15] Footnote in Sand's opinion provides text of Senate Resolution 14957, 129 Cong Rec., Oct. 29, 1983

The military fears that an overwhelming media presence will interfere with the movement of troops or that operations will have to be altered to keep journalists out of the line of fire if they are on the battlefield. U.S. Navy Capt. Michael Sherman, Joint Information Bureau director during Operation Desert Shield, said, "We tried to explain to [the media] that this would be a 40 mile per hour war. Units would move quickly and you had to be a part of them to cover their operations...Weapons on both sides are used to defeat armor [and] ...exposed personnel are not likely to survive." (1992)

War correspondents have always faced the same risks as the troops on the battlefields they cover. Ernie Pyle and other journalists have lost their lives telling the story of America's forces, without discouraging their colleagues in Korea and Vietnam from seeking and receiving wide access to those battlefields. Correspondents in Vietnam also faced the possibility of being in the bush when napalm, cluster bombs and other indiscriminate, mass casualty weapons were used. This risk did not prevent their access to operations.

The Hoffman Report commenting on the objections raised by journalists trying to cover U.S. military operations in Panama recommended that the personal safety of reporters should not be used again to keep them away from the fighting. The public affairs planning guidance in the Joint Operational Planning and Execution System also states that personal safety should not be used to justify denying media access to operations and exercises.[16] Therefore, past practice and current joint service planning doctrine both reveal that a journalist's safety should not be a concern for the military.

Critics of the press coverage of the amphibious landing by U.S. Marines and SEALS on Dec. 8, 1992 in Mogadishu, Somalia argue that the bright television camera light exposed the servicemen to unacceptable risks. Yet, these same critics forget the military informed the press of the time and place of the landing, creating a photo opportunity for the press. (Steger, 1994)

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[16] This comment is based on the author's personal experience preparing public affairs plans for Operations Support Democracy and Uphold Democracy.

Journalists cannot be expected to know there is always a danger of some unexpected resistance inherent in any landing, even during a humanitarian operation. They have shown their desire not to interfere with operations by agreeing not to broadcast live if a forced entry had to be made into Haiti, and to use night-vision camera equipment to prevent exposing troops to hostile observation and fire while being photographed. (Shalikashvili, 1995)

As for supply issues, media provided most of their personal equipment during the Persian Gulf War (i.e. knapsacks, sleeping bags, etc.) The only items issued by the military were food, water, gas masks, helmets and other equipment that media could not obtain in Saudi Arabia. Such items could be obtained from military surplus vendors and brought with the media if they were informed of the need for such equipment in advance. This only leaves the need for resupplying food and water, which non-pool media would either carry in their vehicles or obtain from the nearest town.

Morale encompasses both troops and the American public. While the military obviously has an interest in preserving public support (Sherman, 1992), any concern that public debate would hinder the war effort would have to fail as an interest because such discussion was intended by the founding fathers. (Jacobs, 1992,) In defending the press ban in Grenada, Shultz said, "these days, in the adversary journalism tradition that's been developed, it seems the reporters are always against us." (Kleinberg, 1991) Such criticism of the press ignores the watchdog role of the press the Supreme Court recognized in *New York Times v. United States* and the robust, wide-open public debate mandated in *New York Times v. Sullivan*.

Troops engaged in battle will not have much time to be affected by news reports, nor be likely to receive them in a timely manner. But those who survive will want to know as much as possible about what was achieved and at what cost. Keeping subordinate personnel informed is also a basic principle of military leadership. Thorough and accurate news reports that document the unheralded sacrifices described by Sloyan would go much farther toward good troop morale than limiting coverage. The belief that troops will take unnecessary risks to appear brave in front of the television cameras (Shalikashvili, 1995) ignores the common sense and will to survive inherent in each soldier, sailor, airmen, and Marine.

Of the military's concerns regarding the media, operational security is the most valid. But even with such a compelling interest, there are many who would argue that security review was not the least restrictive or narrowly tailored means of preserving tactical secrets. Security review was the process where military escorts traveling with the media in the press pools would review the stories prepared by the journalists for possible violations of the ground rules. Ground rules were accepted by the media as a prerequisite condition for receiving credentials to cover U.S. forces. The ground rules were intended to prevent reporters from reporting information of tactical value to Iraqi forces (i.e. locations of units, exact troop strengths, known weaknesses and vulnerabilities, etc.). The system was developed from recommendations made by the Sidle panel and was intended to overcome a journalist's lack of knowledge regarding what information might benefit forces opposing U.S. troops.

Jacobs and others have argued that the security review system is overly broad and constitutes prior restraint. Under security review, stories written by journalists accompanying military forces had to be reviewed by their escort *before* being submitted to the Joint Information Bureau for publication by the media. Any perceived violations of the ground rules were discussed between the journalist who authored the report and the military officer escorting the pool. If the journalist disagreed with the escort's finding, the report would be "flagged" for review when it arrived at the Joint Information Bureau in Dhahran. At the JIB, the report would be reviewed by a military representative and the pool coordinator for the medium affected. If they did not agree on the issue, the story would be forwarded to the Pentagon for review by the journalist's senior management and a Pentagon representative.[17]

Williams noted that only five reports were forwarded to the Pentagon and only one of those actually needed to be changed. (Williams, 1991) It has been suggested that the high number of unofficial complaints indicates that some journalists may have agreed to security review suggestions to avoid further delays in filing stories. The government's process of using couriers to deliver stories was also chastised by the press for being untimely in general. Adding a security review challenge would only take more time. (Jacobs, 1992) Reporters were known to have returned from the front to be handed their own, unfiled stories. (Kenealey, 1992) Such delays are believed to be as harmful as outright suppression. (Jacobs, 1992)

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[17] This description is based on the author's experience as a pool escort and a reviewer.

To military planners, security review was essential to balance their constitutional responsibilities to provide information to the public within their obligation to ensure the troops' "right to live." (Sherman, 1992) However, complaints about reviewers asking writers to change descriptions of pilots from "giddy" to "proud" (Knoll, 1991) indicate that some reviewers were also concerned about the principle that "one screw-up' in the press outlives 300 atta-boys.." (Sherman, 1992)

The court in *New York Times v. United States* cited the rule that any "prior restraint of expression come to this court bearing a heavy presumption against its constitutional validity and the government bears a heavy burden of showing justification for the imposition of such a restraint." The court also demanded clear proof that the Pentagon Papers would cause harm if published.(Boydston, 1992) Security review is based upon the opinions of the officers reviewing the stories which may or may not be provable in court.

Considering the fact that only six violations of the ground rules were reported during five years of fighting in Vietnam, the government's belief that security review was necessary to prevent harm was highly speculative. The only time the media was accused of leaking secrets during the Persian Gulf War was in October 1990 when the French publication *L'Express* published what it thought was the plan and the starting date for the ground war. Even that story was alleged to have been a plant to mislead Iraq. General Michael Dugan, chief of staff for the U.S. Air Force, equally erred in telling reporters about specific air targets to be attacked and was later fired by President Bush. If a senior member of the U.S. Air Force could make such an error about what information is releasable, lower-ranking public affairs officers performing security review can also be expected to occasionally misjudge what is sensitive information. This is especially true for those escorts who have not served in combat-related military occupational specialties before being appointed as a public affairs officer.

The media in Desert Storm had ground rules that gave them guidelines on what could and could not be reported upon safely. Military personnel are also trained regarding operational security and should be well aware of what information can and cannot be written home in a letter, spoken over the phone or told to a reporter. Rather that relying upon security review, a less restrictive method to address the military's concern would have been a stronger adherence to the procedures used to protect operational security. It does not matter whether the press are on the battlefield if the military personnel they encounter are not providing them with classified information.

The military is also well versed in jamming electronic signals and could use such equipment to prevent live reports from the battlefield from revealing its troop positions in the absence of an advanced agreement regarding satellite news coverage. Such an extreme does not appear to be necessary, however, since the media demonstrated its willingness to delay its reports from Haiti.

If the press were properly informed regarding how to equip themselves and proper operational security was practiced, it would be more difficult for the media to be a burden to military units on the battlefield or to impose upon the limited supplies of the combat units. Such steps would remove much of the government's stated interest with the exception of overwhelming numbers of non-combatants on the battlefield. Just how many would show up on the battlefield is uncertain, but it should be noted that the reporters who slipped into Khafji were never criticized for getting in the way of the battle, only for being there unescorted. Also, non-pool media will not know when the battle will start and what routes the units will take to their objectives.

Recommendations

A key comment from Judge Sands in the *Nation Magazine* case was the frustration the court faced in trying to obtain recommendations from the plaintiffs for alternatives to the pool system they protested.[18] The Supreme Court would likely note such previous requests and inquire the same of future plaintiffs seeking a judgment. Several of the legal scholars studying this issue recommend variations of a pre-commitment strategy between the media and DOD. Steger believes that a strategy that incorporates a rapid system of judicial review would provide incentive for DOD to honor its commitments. Judicial review would require DOD to explain why pooling or other strategies it recommends are the least restrictive. Such a strategy would incorporate mandatory briefings on voluntary information security guidelines designed to protect operational secrets. Reporters would not be accredited without attending such a briefing. (Steger, 1994)

Boydston believes that past experience justifies a liberal accrediting system with voluntary guidelines. Once accredited, media should receive unrestricted access to the battlefield. Violators would lose their credentials. (Boydston, 1992)

Jacobs recommends that journalists agree to a certain number of reporters to be allowed on the battlefield to prevent commanders from being overwhelmed with large numbers of unescorted media. He also advocates addressing security through specific guidelines. Stiff punishments could be imposed on violators. (Jacobs, 1992)

A Freedom Forum study by journalist Frank Aukofer and Vice Admiral William P. Lawrence, U.S. Navy (Ret.) provided a study of the military-media relationship based on interviews and questionnaires with members of both professions. Their report, America's Team: The Odd Couple, provided the following recommendations:

- Improving the DOD National Media Pool and using it wherever secrecy would be required.
- Establish a multiple tier pool system that would immediately begin after the National Media Pool is disbanded or when secrecy is no longer an issue.

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[18] See *Nation Magazine v. United States DOD*, 762 F. Supp. 1558, 1575 (1991)

- Establishing a media-military office funded by private foundations to operate in Washington, D.C. as a facilitator for press coverage and institutional memory.
- Provide class visits or joint training programs to increase understanding on both sides wherever journalism schools and ROTC programs are co-located.
- Provide broad access to the battlefield without censorship--except in broad circumstances that must be agreed to in advance by both sides.

Judge Sands, in acknowledging a limited right of the media to gather information, also ruled that there would be some circumstances where the press would not be entitled to access, citing military bases and other government-controlled installations as private forums.[19] This ruling should still prove acceptable to the media since all they have asked to cover in *Nation Magazine* and other protests is the open battlefield, where fighting is plainly visible and the enemy is well aware of the presence of U.S. or allied forces.

Since future courts will likely seek proposed alternatives from plantiffs before ruling against Defense Department policies on combat coverage, it is recommended that media organizations work together to lobby for Congressional hearings on legislation that would:

- Specify ground rules for media coverage of military operations and prohibit any pre-publication review by DOD unless requested by journalists concerned about the accuracy of their reports.
- Mandate a minimum level of support to make news coverage possible by requiring DOD to plan for the transportation, billeting and feeding of an acceptable ratio of media representatives to the size force involved.
- Amend DOD planning guidance to reflect such a ratio.
- Require DOD to report to Congress by a specified date and at regular intervals on what capabilities it has developed to support media coverage of military operations.
- Prohibit DOD from barring coverage on the open battlefield by accredited reporters.

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[19] See *Nation Magazine v. United States DOD*, 762 F. Supp. 1558, 1571 (1991)

These steps would allow the media and the military to develop mandatory guidelines on an equal footing. It would also allow small and medium-sized markets as well as non-traditional media who lack bureaus in the capital to have access to the discussion through their respective congressmen. There are many small media outlets that cover military units based in their coverage area. These smaller outlets have interests that might not be represented by talks between the leading news organizations and the Defense Department. Congressional action would allow these outlets to be heard through their elected representatives.

Most importantly, congressional action would provide a legislative history that would assist the Supreme Court if the resulting legislation from Congress was appealed by either side. As Judge Sands noted, lower courts are reluctant to rule on abstract issues regarding such constitutional principles without guidance from the Supreme Court. Ruling on the constitutionality of such legislation would provide a forum, if necessary, for the court to resolve any questions about the media's right to cover the military without requiring an on-going conflict or operation.

Congressional hearings would also facilitate discussion from both sides to codify reasonable, time, place and manner limits on the use of high-technology, delaying information about troop movements and locations that have already been recognized as justifiably restrained speech in *Near v. Minnesota*. Even though journalists may have a limited right to be on the battlefield, the *Near* ruling makes it doubtful that a court would uphold any argument against constraining news reports in the interest of protecting troop movements and locations. Time, place and manner rules would assuage fears that live broadcast technology would provide aid and comfort to the enemy by establishing limits on how close satellite transmission equipment could be stationed by the media to the areas where fighting is occurring or is most likely to erupt. Such limitations would preserve the military commander's need to surprise his foe and still allow for expedited reporting from forward areas. Resolving such questions could prevent having to ship reports to rear areas for transmission as was done during the Persian Gulf War.

Having a law or regulation also prevents new media organizations who were not involved in discussions with the Pentagon from circumventing reasonable protections for national security and troop safety. It also prevents DOD from using its ability to control access to certain areas when it cannot control what is being transmitted by journalists.

Requiring a certain level of transportation to be available would ensure that there would always be some coverage of significant military actions. Allowing accredited journalists not traveling with units to still have access to the battlefield would further provide a means for those not able to obtain a seat in a pool to seek stories on their own that might not otherwise be reported. Unescorted journalists would face greater risks, and should be apprised of them, but in a free society the decision to face such danger should be left up to them. The thousands of journalists that Sherman and others estimate would flock to the battlefield based on coverage of the Los Angeles Olympic Games is not realistic. As Fialka reported in his book, Hotel Warriors, only about 10 percent of the media made an effort to get out into the field. "In all American wars, the number of journalists who actually witness the violence, danger, bloodshed, and the snafus of combat is a tiny minority of those who go to cover war...Colonel Mulvey, who fended off the crowds of reporters at the [Joint Information Bureau] in the Dhahran International Hotel, recalls that as the commander of a rifle platoon in Vietnam, 'I never saw a reporter the entire year in the field." (Fialka, 1992) The press could also have flocked to the battlefields of Vietnam where it was easy to enter the country, obtain accreditation and travel the countryside.

Conclusion

Aukofer and Lawrence argue that agreements on guidelines for media representation should be developed informally. But, such an argument ignores the failure of two past informal rounds of dialogue to provide access in Panama and Desert Storm that was acceptable to the media. The ability of the American public to make informed decisions is too important not to be codified, especially if the right of access is to be a limited one. Without ensuring the press' right to be present, and clearly identifying the criteria for reasonable exclusions of the media, informal agreements will allow arbitrary decisions by military commanders to continue to affect the coverage of combat areas.

In many cases it will also be a moot point to argue the media's right of access since they will already be present. The U.S. Army already uses mock media crews to train its commanders during field training at the National Training Center, Ft. Irwin, Calif. in order to prepare them for the presence of media on the battlefield. If we acknowledge that media may be on the field ahead of the troops, and prepare for their questions, have we not created a limited public fora? [20]

Those who watched Lt.Gen. Hugh Shelton become engulfed by reporters upon his arrival at Haiti's Port-au-Prince airport on Sept. 20, 1994 should realize that there will be many campaigns where the media will already be there ahead of the military. U.S. Marines and XVIII Airborne Corps forces forcibly landing in Haiti would have assaulted through a small army of correspondents on their way to the presidential palace. The forces deployed to Bosnia to support the peacemaking process there were also welcomed by the press. International relationships among the media make it increasingly unlikely that any system designed to prevent media access can be maintained anyway.

If a lasting settlement to this issue is ever to be reached, it must be through a clear, binding resolution that cannot be changed from one administration to the next. To do otherwise deprives the media of the due process guarantees prescribed under the Fifth Amendment, and the predictability of knowing what conduct is expected of them and the government in the next military campaign. Journalists must know what is expected of them under the law and what their rights are if they are to truly enjoy due process. Vague, informal agreements that only major media organizations participate in forming do not uphold this principle.

Let us not forget that it was an unescorted observer during the War of 1812 that captured one of America's proudest moments on the back of an envelope. If the British had been more worried about security, logistics and their own morale, Francis Scott Key would not have been afloat offshore from Fort McHenry the night he was inspired to write our national anthem. Many other equally inspiring moments may have been lost during Grenada, Panama and the liberation of Kuwait. Hopefully, there will be a successful resolution to this issue that ensures no others will be lost in the future.

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[20] See *Sherill v. Knight*, 569 F. 2d. 124, 129 (D.C. Cir., 1977) where the court acknowledged the White House's accommodations for the media had created a limited public forum which media cannot be excluded from arbitrarily, even to protect the President.

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THE FREEDOM OF INFORMATION ACT AND ACCESS TO COMPUTERIZED GOVERNMENT INFORMATION

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THE FREEDOM OF INFORMATION ACT AND ACCESS TO COMPUTERIZED GOVERNMENT INFORMATION

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ABSTRACT

This study analyzes the Freedom of Information Act (FOIA) and its use to access computerized government information. Previous court rulings were also examined. The Senate Bill, Electronic FOIA (S. 1090), was examined in the light of the FOIA, current computer access and the court rulings to determine how this bill would improve access to computer records.

Because of the current FOIA's lack of provisions for computer records, courts have been inconsistent in their respective views about such issues as format of disclosure, computer redaction, time limit and cost. Record-requesters are at times subjected to high fees, significant delays, and denials of information. Over all the proposed bill does not address the difficulties adequately. Some modifications need to be made before the amendment is passed into law.

THE FREEDOM OF INFORMATION ACT AND ACCESS TO COMPUTERIZED GOVERNMENT INFORMATION

INTRODUCTION

The constitutional right to know embraces the right of the public to obtain information from the government. In a democracy, it is the citizens themselves, not their elected representatives and appointed officials, who are the ultimate decision makers with respect to the actions and policies of their nation. The purpose of the First Amendment prohibitions is to prevent governmental interference in communication--both among the people and between the people and their governing agents. The people must have all information available in order to instruct the government.[1]

Congress enacted the FOIA out of a belief that the public has a right to government information and that public access to such information is essential if the government is to be accountable to the electorate.[2] Ever since its passage,[3] according to Harry Hammitt, the FOIA, has been serving as an important legal tool for the public "in their attempts to monitor the behavior of government -- to discover the extent of government action or inaction and the how and why of government decision making."[4] Public interest has been greatly advanced through FOIA when it helped lead to the disclosure of waste, fraud, and wrongdoing in the society or government,[5] and lead to the identification of unsafe consumer products,[6] harmful drugs, and health hazards.[7]

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[1] Thomas I. Emerson, "The First Amendment and the Right to Know," 1976 Wash. U.L.Q. 1, 14 (1976).

[2] Ann H. Wion, "The Definitions of 'Agency Records' Under the Freedom of Information Act," 31 Stanford L. Rev. 1093, 1094 (1979), citing the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations & Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Source Book: Legislative History, Texts, and other Documents 236-37, 243, 298 (Jt. Comm. Print 1975), and Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 22, 33, 36, 38, 73, 80, 106 (Comm. Print 1974).

[3] Before the FOIA was enacted, people's right of access to government-held records was not so widely recognized. See, e.g. "Computerization of Government Files: What Impact on the Individual?" 15 U.C.L.A. L. Rev. 1371, 1438 (1968): Ninety-five percent of the federal records were considered "theoretically confidential," either by statute or, where there was no statute, by reason of a "pledge" to information respondents. In 17 percent of these records, the information was not disclosed beyond the collecting office; in 18 percent, it was not disclosed beyond the encompassing department or agency; and in 25 percent, information was not disclosed beyond the "government," citing Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary, 90th Cong., 1st Sess., Government Dossier 4 (Comm. Print 1967).

With all the benefits the FOIA brings to the public, however, the Act has failed to ensure maximum disclosure to the public.[8] Some observers have described it as a "two-edged sword"[9] that cuts through the red tape to help obtain government-held public information while, at the same time, establishing criteria through which certain information can be protected from disclosure.[10]

Many problems have evolved regarding FOIA access since it was enacted. Issues concerning electronic records have, in particular, drawn much recent attention. With the advance of technology, more and more government agencies are storing public information in electronic

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4 Harry Hammitt, "The Freedom of Information Act," in The Reporter's Handbook: An Investigator's Guide to Documents and Techniques, 73 (John Ullmann and Jan Colbert, eds, 2d ed. 1991).

5 The Louisville Courier-Journal published a series of articles in 1980 based on federal inspection reports from the Department of Health, Education and Welfare about nursing homes conditions in Kentucky. The reports showed these abuses of residents: "no fire codes, people were being fed one meal a day, which was oatmeal. Some people were not being fed at all. Some were strapped to their beds on the third floor, people who couldn't walk were kept in beds that were made of wood -- sheer fire traps." After the reports were disclosed by the newspaper, the State Assembly passed the Comprehensive Nursing Home Reform Act. Many substandard nursing homes were closed. The State Attorney General's office also opened a Nursing Home Abuse and Fraud Investigative Unit. Several nursing homes have been indicted for patient abuse and Medicaid fraud. See Evan Hendricks, Former Secrets: Government Records Made Public Through the Freedom of Information Act 13 (1982).

6 See *Id.* at 21, for example, in 1980, the Public Citizen Health Research Group obtained from the Food and Drug Administration an Adverse Reaction report filed by companies showing that Smith, Kline and French, the maker of an anti-high blood pressure drug called Selzcryn, had failed to report liver damage the drug had caused. According to the FDA, 60 deaths and 513 cases of liver damage occurred in people using Selzcryn. The disclosure led to the FDA's request for criminal prosecution of the drug manufacturer, the first time the agency has ever recommended such criminal prosecution.

7 Orien Reid of WCAU-TV in Philadelphia, for example, conducted an investigation on poultry plants based on information requested through the FOIA and found out that the poultry industry often shipped contaminated poultry to the public. The story was broadcast on November 25-27, 1991. See Investigative Reporters and Editors 100 Selected Investigations from 1991 & 1992 Contest Entries 91 (Steve Weinberg and Andrew Scott, eds., 1992).

8 How To Use the Freedom of Information Act i, 1989.

9 *Id*

10 *Id.*

form.[11] But since the current FOIA makes no mention of electronic records, problems occur when individuals wish to obtain such information. Those problems include: whether the agency should disclose information stored in electronic format; how large a fee the agency should charge for electronic records; what time limits should be followed for responding to an electronic request; and whether the agency should adopt redaction for restricted information.

Members of the news media are among those who have been experiencing the greatest frustration with FOIA when they try to gain access to electronic public records. Many newsrooms have been equipped with computer systems that can analyze millions of records stored on computer tapes or disks. This capacity has made it possible for government computer databases to become an essential source for enhancing investigative reporting.[12]

This paper studies the federal government's current practice of information control over computerized government records and reports on the existing problems in accessing such records. This was done by examining the FOIA and past amendments to it, related court cases and the bill sponsored by Senator Patrick Leahy to amend the FOIA.[13] The paper closes with suggestions and recommendations for the Congress with regard to this proposed bill to amend the FOIA.

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[11] In 1950, there were 2 computers in use at the federal level. In 1955, 45 computers; in 1960, 403; in 1965, 1826; in 1970, 5277; in 1986, 22,000 mainframe computers; and by 1990, more than 48,000. See Databanks in a Free Society: Computers, Record-Keeping and Privacy, Report of the Project on Computer Databanks of the Computer Science and Engineering Board, National Academy of Sciences 29 (1973); and Sigman L. Splichal and Bill F. Chamberlin, "The Fight for Access to Government Records Round Two: Enter the Computer," 71 Journalism Q. 550 (1994), citing General Services Administration, Federal Equipment Data Center, Automatic Data Processing Equipment in the U.S. Government (April 1990).

[12] For example: Patrick Boyle of the Washington Times examined computer data and found that over 19 years, more than 1,000 Boy Scouts had charged that their Scout leaders had sexually abused them and that at least 416 leaders had been arrested or banned from scouting for alleged sex abuse of Scouts.; Dayton Daily News's Mike Casey and Russell Carollo analyzed the computer tapes of the Occupational Safety and Health Administration (OSHA) and discovered that OSHA was "lax in investigating worker safety and in imposing fines for safety violations." Kansas City Star's Jeff Taylor and Mike McGraw analyzed 8.2 million computer records of the United States Department of Agriculture and produce a Pulitzer Prize-winning series. Source: A Selection of Computer-Assisted Investigations From the IRE Morgue 45, 46and 68 (Jonathan Schmid and Andrew Scott eds., 1992).

[13] S. Rep. No. 1090, 104th Cong., 1d Sess. (1995).

FOIA AND ITS LEGISLATIVE HISTORY

The Freedom of Information Act (FOIA), signed into law by President Lyndon Johnson on July 4, 1966, and placed into effect in 1967, was based on the premise that "any person" has a legal right of access to records held by federal government agencies.[14] Before the FOIA was enacted, access to government information was controlled by the Administrative Procedure Act of 1946,[15] which was considered by the Congress to be of little or no value in gaining access to the records of the federal government.[16]

At the culmination of a 10-year debate among agency officials, legislators and representatives of the public interest groups, including representatives of the news media, the FOIA was finally passed into law.[17] Under the federal FOIA, all the records kept by a federal executive branch agency must be made available to the public upon request unless they are specifically exempted from disclosure.[18]

Despite FOIA's presumption of openness, to discourage use of the Act, government agencies have often interpreted the Act's exemptions broadly, employing such means as high fees and long delays, or claiming that the requested materials can not be found.[19] Courts, on the other hand, have interpreted most exemptions narrowly and fashioned procedural remedies against agency intransigence.[20] Exemption 1, national defense, and Exemption 7, law enforcement records, however, have been interpreted broadly to permit agencies to withhold investigatory files and classified documents for all time.[21]

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[14] Freedom of Information Act, 5 U.S.C.§ 552 (1966).

[15] Administrative Procedure Act, 5 U.S.C. § 1002 (1946).

[16] H. R. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

[17] Alan B. Levenson and Harvey L. Pitt, Government Information: Freedom of Information Act, Sunshine Act, Privacy Act 69 (1978).

[18] 5 U.S.C. § 552(b). Information protected from disclosure by nine exemptions.

[19] Allan R. Adler, "Overview of the Freedom of Information Act," in Litigation Under The Federal Open Government Laws 7 (1993).

[20] *Id.* at 8. See, e.g., **Vaughn v. Rosen**, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) and **EPA v. Mink**, 410 U.S. 73, at 91 (1973).

The FOIA was amended in 1974. The 1974 amendments narrowed the scope of the law enforcement and national defense exemptions[22] and broadened many of the law's procedural provisions, such as those relating to fees,[23] time limits,[24] segregability, and in camera inspection by the courts of withheld information. The amendments required agencies to establish uniform and reasonable fees for locating and duplicating records and to set time limits for responding to requests, appeals and lawsuits.[25]

FOIA's Exemption 3 was amended in 1976. It provided standards to determine more precisely which "other statutes" may be used as grounds for withholding information under FOIA.[26]

The FOIA is supplemented by the Privacy Act of 1974, which requires that federal agencies give a person the opportunity to inspect his/her own files and amend incorrect records.[27] This Act also limits the disclosure of records that an agency may make without the written consent of the individual. The Privacy Act has been considered a law seeking to "preserve the individual's interest in privacy while at the same time recognizing the legitimate needs of government for information."[28]

The Privacy Act has been a protective law for personal privacy. However, it has sometimes been used by government agencies, along with the privacy exemption of the FOIA, to withhold information requested.[29] The enactment of the Privacy Act has been considered to have two effects on the disclosure of information under the FOIA: 1) It removes agency discretion to disclose information that might have been withheld under the sixth (privacy) exemption and 2) it has expanded the information available to an individual requesting records about himself or herself.[30]

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[21] *Id.* See, e.g., **EPA v. Mink**, and **Frankel v. SEC**, 460 F.2d 813 (2d Cir. 1972) cert. denied, 409 U.S. 889 (1972).

[22] 5 U.S.C. § 552(b)(7) and (b)(1).

[23] *Id.* § 552(a)(4)(A).

[24] An agency is required to respond to requests within 10 working days, or the requester may take legal actions against the agency.

[25] *Id.* § 552(a)(4)(B), cited in Freedom of Information Act Guide & Privacy Act Overview 8 (Pamela Maida ed., 1993) and Alan B. Levenson and Harvey L. Pitt, Government Information: Freedom of Information Act, Sunshine Act, Privacy Act 111 (1978).

[26] *Id.* § 552(b)(3)(1976).

[27] The Privacy Act, 5 U.S.C. § 552a.

[28] "The Privacy Act of 1974: An Overview," 1976 Duke L.J. 301.

In 1986, the FOIA was amended again after five years of legislative deliberation.[31] The Freedom of Information Reform Act of 1986[32] changed the law enforcement exemption[33] and provided a new set of provisions regarding fees and fee waivers.[34] Based upon the provisions of this Act, requests were to be subject to more standard FOIA fees according to the categories into which they fall, with requesters still entitled to seek a complete waiver of fees under a revised general fee waiver standard. News media, educational institutions and non-commercial scientific institutions received preferred status,[35] while commercial users had to pay a higher percentage of the actual costs of processing requests.

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[29] For example, in preparing a series of stories on federal farm programs, Dale Kueter of the Cedar Rapids Gazette requested a list of names of top recipients of agriculture subsidies from the United States Department of Agriculture (USDA). The USDA rejected his request, citing the privacy exemption of the FOIA, the Privacy Act, and the 1989 **U.S. Department of Justice v. Reporters Committee for Freedom of the Press** decision, in spite of the fact that prior to the 1989 ruling names of subsidy recipients could be published. See also Dale Kueter, "USDA refuses to divulge names of subsidy," Cedar Rapids Gazette, May 1994, and letters from USDA to Dale Kueter (Aug. 6, 1993 and Dec. 9, 1993).

[30] Thomas M. Susman, "The Privacy Act and the Freedom of Information Act: Conflict and Resolution," 21 J. Mar. L. Rev. 703, 707-708 (1988).

[31] Public Law No. 99-570, 1801-1804, 100 Stat. 3207, 3207-48 (1986).

[32] The reform bill, S. 1730, was approved by the Senate Judiciary Committee on May 20, 1982. The extensive reform bill, S. 774, was passed by the Senate in February, 1984. However, the bill was stalled at the House of Representatives for two years. In 1986, a limited FOIA reform bill, Freedom of Information Act Amendments of 1986 (H.R. 4862), which dealt with business information protection procedures only, was introduced by Reps. Glenn English and Thomas A. Kindness. In 1986, Congress finally passed the "Freedom of Information Reform Act of 1986," which amended the FOIA to provide broader exemption protection for law enforcement information and new law enforcement record exclusions, and created a new fee and fee waiver structure. See FOIA Update (Off. of Info. & Privacy, United States Department of Justice, Wash., D.C.), Dec. 1981, at 1-2; March 1982, at 1-2; June 1982, at 1-2; Spring 1983, at 1; Summer 1983, at 1-2; Winter 1984, at 1, 6; Summer 1984, at 1, 4; Fall 1984, at 1; Spring 1986, at 1, 3; Fall 1986, at 1, 2.

[33] 5 U.S.C. § 552(b)(7)(1986).

[34] *Id.* § 552(a)(4)(A)(1986).

In 1991, a pair of bills, The "Freedom of Information Improvement Act of 1991" and the "Electronic Freedom of Information Improvement Act" were introduced by Senator Patrick Leahy to amend FOIA.[36] The "Freedom of Information Improvement Act of 1991" would have altered several of the FOIA's exemptions and amended the definition of the term "agency" under FOIA to include Congress and the Offices of the President and the Vice President.[37] The "Electronic Freedom of Information Improvement Act" would have included electronic records and addressed time limit issues and would have defined the term "record" for the first time under the Act.[38]

In 1993, Leahy introduced another "Electronic Freedom of Information Improvement Act," which was substantially identical to the bill introduced the previous year. However, the "Freedom of Information Improvement Act (S. 1939) that contained substantive revisions of FOIA exemptions was not reintroduced in the 102nd Congress.[39] In August, 1994, after some modification, the bill unanimously passed the Senate.[40] This proposed legislation, which contains several provisions regarding electronic records, was reintroduced in the 104th Congress.[41]

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[35] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[36] S. 1939 and S. 1940, The Electronic Freedom of Information Improvement Act, Hearing before the Subcommittee on Technology and the Law of the Committee on the Judiciary, United States Senate, 102d Cong., 2d Sess. (1992).

[37] S. 1939, section 5, (1991). The bill was referred to the Committee on the Judiciary, but no action was taken on it during the 102d Congress. See also FOIA Update (Off. of Info. & Privacy, United States Department of Justice, Wash., D.C.), Fall 1991, at 1.

[38] S. 1940, 102d Cong., 2d Sess.(1992). Sect. 7(1): "[T]he term 'record' includes all books, papers, maps, photographs, data, computer programs, machine readable materials, and computerized, digitized, and electronic information, regardless of the medium by which it is stored, or other documentary materials, regardless of physical form or characteristics...." This bill was held by the Subcommittee on Technology and the Law in 1992.

[39] See also: FOIA Update, Winter 1994, at 1.

[40] S. Rep. No. 1782, 103d Cong., 1994, 2d Sess. The bill was approved by the Technology and the Law Subcommittee on June 29, 1994, and by the Senate Judiciary Committee on Aug. 11, 1994.

[41] The "Electronic Freedom of Information Improvement Act of 1995," S.1090, 104th Cong., 1st Sess. (July 28, 1995).

FINDINGS

A. The Definition of A "Record"

Courts' Rulings on "What Is A Record?"

Federal government agencies are required to make their records available to "any person" who submits a request under the FOIA.[42] However, since the Act does not define the term "record," problems occur when requesters have tried to obtain computerized information from a federal government agency.[43] Thus, courts have sometimes relied on definitions provided by other statutes to determine whether certain information is a "record."

One of the statutes most often cited in FOIA cases by the courts in deciding whether the information sought is a record is the "Disposal of Records" chapter of the Public Printing and Documents Act. The Act defines "record" as including all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics...."[44]

In **Save the Dolphins v. United States Department of Commerce**,[45] the United States District Court for the Northern District of California, citing the Record Disposal Act, found that materials created to store information are "records," no matter what form in which they are maintained. The court said:

> The object of the Freedom of Information Act is to make available to the public "information" in the possession of government agencies. The term "record" in common parlance includes various means of storing information for future reference. There does not appear to be any good reason for limiting "records" as used in the Act to written documents.[46]

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[42] 5 U.S.C. § 552 (1966).

[43] In the early years of the FOIA, Congress was already aware of problems that could arise in the application of the FOIA to computerized information. See S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974) reprinted in House Comm. on Government Operations and Senate Comm. on the Judiciary, Freedom of Information Act and Amendments of 1974: Source Book, 94th Cong., 1st Sess. 164 (Joint Committee Print 1975).

[44] Chapter. 33, Disposal of Records of the Public Printing and Documents Act, 44 U.S.C. § 3301 et seq. (1976). The term "machine readable materials" was added to the Act in the 1976 amendment.

[45] **Save the Dolphins v. Dep't of Commerce**, 404 F. Supp. 407 (N.D. Cal. 1975).

[46] *Id* at 411.

In 1980, in **Forsham v. Harris**,[47] the United States Supreme Court held that records developed and held by a private group of physicians and scientists studying diabetic treatment under a grant from the Department of Health, Education and Welfare (HEW) were not "agency records" accessible under the FOIA because the records did not meet the requirement that they be "made or received" by a federal agency. However, the Court did hint that electronic records could be a record disclosable under the FOIA by pointing out that the definition of "record" in the Records Disposal Act (RDA) specifically included "machine readable materials" in the definition.[48]

Likewise, the RDA definition has been adopted by the federal courts in many other FOIA cases to determine whether the information sought is a disclosable "record" under the FOIA.[49] However, on the other hand, not all the federal courts have adopted the RDA definition to determine whether the information requested was a record disclosable under the purpose of the FOIA. The United States Court of Appeals for the District of Columbia Circuit in such cases as **Goland v. CIA** and **Ryan v. CIA** found that the definition of "record" in the Records Disposal Act did not apply to the FOIA.[50]

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[47] **Forsham v. Harris**, 445 U.S. 169, 183 (1980).

[48] *Id.* The Court, citing 44 U.S.C. § 3301 (1988), said that"[a]lthough Congress has supplied no definition of agency records in the FOIA, it has formulated a definition in other Acts."

[49] This definition can be found in such cases as **Nichols v. United States**, 325 F. Supp. 130, 134 (D.Kan. 1971); **Nixon v. Sampson**, 389 F. Supp. 107, 144 (D.D.C. 1975); **St. Paul's Benevolent Educational and Missionary Institute v. United States**, 506 F. Supp. 822, 828 (D.N. Ga. 1980); **Kissinger v. Reporters Committee for Freedom of the Press**, 445 U.S. 136, 147 (1980); **Weisberg v. Department of Justice**, 631 F.2d 824, 828 (1980, D.C. Cir.); **Washington Post v. Department of State**, 632 F. Supp. 607, 615 (D.D.C. 1986); **Wolfe v. Department of Health and Human Services**, 539 F. Supp. 276, 278 (D.D.C. 1982); **TWA v. National Mediation Board**, 111 L.R.R.M. 2020; 97 Lab. Cas. (CCH) P10, 159 (1982); **Bureau of National Affairs v. Department of Justice**, 742 F.2d 1484 (1984); **Department of Justice v. Tax Analysts**, 492 U.S. 136, 145 (1989); **Teich v. Food and Drug Administration**, 742 F. 2d. 1484, 1493 (D.C. Cir. 1984); **Cleary, Gottlieb, Steen & Hamilton v. United States Department of Health and Human Services**, 844 F. Supp. 770, 782 (D.D.C. 1993); and **Katz v. National Archives & Records Administration**, 862 F. Supp. 476, 480 (D.D.C. 1994).

[50] **Goland v. CIA**, 607 F.2d 339, 346 (D.C. Cir. 1978). **Ryan v. CIA**, 617 F.2d 781, 784 (D.C. Cir. 1980). In **Ryan**, the court, citing **Goland**, said that the Records Disposal Act (44 U.S.C. @3301) is not applicable to the FOIA.

As for computerized records, courts in many cases have long recognized that such information falls within the meaning of the FOIA. In 1979, an important ruling from the United States Court of Appeals for the Ninth Circuit came down in **Long v. United States Internal Revenue Service** (IRS).[51] In this case, Susan B. Long and Philip H. Long sought access to computerized taxpayer information from the IRS. Then-Judge Anthony M. Kennedy (currently a Supreme Court Justice) reversed a federal district court, which had said that the FOIA did not apply to computer tapes. Kennedy said that "[i]n view of the common, widespread use of computers by government agencies for information storage and processing, any interpretation of the FOIA which limits its application to conventional written documents contradicts the general philosophy of full agency disclosure."[52] In **Long**, Kennedy made three important rulings: 1) "The FOIA applies to computer tapes to the same extent it applies to any other documents;"[53] 2) "mere deletion of names, addresses and social security numbers does not result in an agency's creating a whole new record within the rule that the Act does not require agency to create records that did not previously exist;"[54] and 3) "editing required to delete names, addresses and social security numbers from computer data tapes was not considered an unreasonable burden to place on the agency."[55]

In 1982, in **Yeager v. Drug Enforcement Administration**, the United States Court of Appeals for the District of Columbia Circuit Circuit cited **Long** and held that computerized records, whether stored in the central processing unit, on magnetic tape or in some other form, are still "records" for purposes of the FOIA.[56] The Court said:

> Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot

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[51] **Long v. IRS**, 596 F.2d 362 (9th Cir. 1979).

[52] *Id.* at 364.

[53] *Id.* at 365, citing **Save the Dolphins** and **SDC Development Corp. v. Mathews**, 542 F.2d 1116 (9th Cir. 1976).

[54] *Id.*

[55] *Id.* at 366.

[56] **Yeager v. DEA**, 678 F.2d 315, 321 (D.C. Cir. 1982).

diminish the duties imposed by the FOIA.[57]

The courts have long been relying on the definition of "record" provided by other statutes. In **Long** and **Yeager**, courts have helped set a positive precedent for the long-disputed issue regarding electronically-stored information.

The Proposed Amendment Bill on "What Is A Record?"

The "Electronic Freedom of Information Improvement Act of 1994" was unanimously passed by the Senate in 1994[58] However, it was not considered in the House of Representatives. Therefore, Leahy reintroduce an extremely similar bill, "The Electronic Freedom of Information Improvement Act of 1995."[59] It promised to: 1) "foster democracy by ensuring public access to agency records and information;" 2) "improve public access to agency records and information;" 3) "ensure agency compliance with statutory time limits;" and 4) "maximize the usefulness of agency records and information collected, maintained, used, retained and disseminated by the federal government."[60] In addition, this amendment to the FOIA would, for the first time, define the term, "record." It defines "record" as: "all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics."[61]

Observations and Discussions

Although the current version of the FOIA does not mention computerized information, courts have generally agreed that such information is a record under the Act. Patti A. Goldman points out in her research paper that the FOIA has established flexible public access principles that can be applied to computerized records.[62] However, the reality is that federal government agencies, because of the lack of consensus over what constitutes a record, have a history of being resistant or reluctant to treat electronic data as they treat any other traditional type of information. FOIA's goal of openness is virtually impossible to reach unless the law specifically expands its provisions to cover computer information. Goldman's argument is sound -- that it is the agencies' interpretations of FOIA, not the FOIA itself, that need to be changed.[63] However, such a concept is idealistic and not realistic. Judging from agencies' treatment of the requests for computerized information, it would be very difficult to assume that the agencies could change their attitudes overnight. Therefore, it is very important that the term "record" be specifically defined in the amended FOIA. If agencies could have a specific guideline as to what kind of information can be disclosed, the goal of changing their attitudes would, perhaps eventually, be reached. In addition, with the term clearly defined, the courts would not have to continue to rely on other statutes when they were deciding cases that are solely related to the FOIA.

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[57] *Id.*

[58] S. Rep. No. 1782, 103d Cong., 2d Sess. (1994)

[59] S. Rep. No. 1090, 104th Cong., 1st Sess. (1995)

[60] *Id.* Section 2(b)(1)-(4).

[61] *Id.* at 4, as revised 552 Section 8 (f)(2).

B. Format of Disclosure

Courts' Rulings on Format of Disclosure

Because courts have explicitly reiterated that computerized information can be a record disclosable under the FOIA, requesters are supposed to have an easier time obtaining such information. Nevertheless, that is not what has happened. New problems have evolved with the increase in demand for computerized data. One specific issue is whether requesters have the right to choose the format in which they get stored data.

In 1984, a controversial ruling came down from the United States District Court for the District of Columbia regarding whether an FOIA requester may specify the format of information he/she seeks from an agency. Philip Dismukes filed an FOIA request with the Department of Interior (DOI) for a copy of a computer tape which contained a list of participants in the six 1982 Bureau of Land Management Simultaneous Oil and Gas Leasing bimonthly lotteries. The DOI rejected Dismukes's request for the reason that the requested information was available to the public on microfiche cards, and the DOI wanted to provide him with the information in that form.[64] Although the judge in this case acknowledged that the computer tape would offer the "least expensive" and "most convenient means" of access to the lottery information compiled by the DOI, he ruled against **Dismukes**, saying that the DOI has no obligation to accommodate his preference. The court said that the DOI needed only provide responsive, nonexempt information in a reasonably accessible form and that DOI's offer to Dismukes satisfied that obligation.[65]

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[62] Patti A. Goldman, "The Freedom of Information Act Needs No Amendment to Ensure Access to Electronic Records," 7 Gov't Info. Q. 389 (1990).

[63] *Id.* at 400.

Although such reasoning has been accepted by the United States District Court for the **District of Columbia in Coalition for Alternatives in Nutrition & Healthcare (CANAH) v. Food and Drug Administration (FDA)**,[66] courts at both federal and state levels, in general, have tended to reject the Dismukes view and tried to recognize requesters' right to obtain information in a desired format.[67]

In **AFSCME v. Cook County**, the Illinois Supreme Court explicitly expressed its view regarding **Dismukes** and disclosure of information in a format requested. It said that:

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[64] **Dismukes v. Dep't of Interior**, 603 F. Supp 760 (D.D.C. 1984).

[65] *Id.* at 763.

[66] **CANAH v. FDA**, 1991 U.S. Dist. LEXIS 71. In this case, the CANAH made an FOIA request to the Center for Disease Control (CDC) and several other federal agencies for information relating to L-tryptophan. CDC responded to CANAH's request by transmitting the requested documents in microfiche format, which was objected by the CANAH, saying it had limited access to a microfiche reader. The D.C. District Court held that the CDC did not have to furnish the documents in the format requested (computer printout) by the CANAH.

[67] Among these cases are: **American Federation of State, County & Municipal Employees (AFSCME) v. Cook County**, No. 68677; 136 Ill. 2d. 334; 1990 Ill. LEXIS 60. **Brownstone Publishers, Inc. v. Department of Buildings** (550 N.Y.S.2d 564; 1990 N.Y. Misc. LEXIS 20; 17 Media L. Rep. 2237), **Farrell v. City of Detroit** (No. 150355; 209 Mich. App. 7; Mich. App. LEXIS 53, 8 (February 1995)), and **Petroleum Information Corp. v. Department of Interior** (976 F.2d 1429, 1437 (D.C. Cir. 1992)). In **AFSCME**, the Illinois Supreme Court disagreed and rejected Dismukes' applicability to the statute. In **Farrell**, David Farrell, a staff writer of The Detroit News, sought access to the City of Detroit's computerized property taxes information. The trial court granted summary disposition for the city on the basis that it had no duty to provide a new document or record and that providing hard copies of the requested information was sufficient to comply with the state FOIA. But the ruling was reversed by the Michigan Court of Appeals. In **Petroleum**, Petroleum Information Corp. submitted an FOIA request to the Bureau of Land Management, seeking access to records from a computer data bank containing information on public lands. The Bureau resisted disclosure, arguing that the information requested is an unfinished "draft" protected by the FOIA's deliberative process privilege (5 U.S.C. §552(b)(5)(1988)). The court held that the information is not shielded by the deliberative process privilege and granted a summary judgment in favor of Petroleum Information Corp.

> The [Dismukes] court came to this conclusion because it found that what was important was the information content of the record and not the record itself for the purpose of the Federal Freedom of Information Act. The Federal statute appears to require only that "public information" be made available.... The Illinois Act, however, requires that "public records," which include computer tapes, be made available. That is, the Illinois Act is not solely concerned with content, it also requires that information be made available in the form in which it is normally kept.[68]

In **Brownstone**, another significant decision in this area, the Supreme Court of New York shared a view similar to that of the Illinois Supreme Court, also rejecting the "reasonably accessible form" standard of Dismukes. In this case, Brownstone Publishers, Inc., a publishing and information services company, applied to the Department of Buildings (DOB) for its "DOB-BIS" property computer files containing statistical information on every parcel of real property in New York City. The DOB agreed to provide the information in hard copy printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone. This task would have taken five or six weeks to complete, and then Brownstone would have to "reconvert the data into a computer-usable form at a cost of hundreds of thousands of dollars."[69] The Court, detecting that the DOB was "apparently intending to discourage this and similar requests," tersely ordered that the DOB must disclose information in the computerized format as sought by the requester even if the request is motivated by commercial interests.[70]

Recently, a quite disturbing ruling came down from the District Court for the Northern District of California when it returned to rely on **Dismukes**. In **Baizer v. United States Department of the Air Force**,[71] the court was asked to decide whether an agency must provide a copy of a computer database containing the decisions of the United States Supreme Court to a requester.[72] It held that since in **Dismukes** it had been well established that the FOIA was concerned with the content of information, not its form, the government agency would not be required to produce the records in precisely the format the plaintiff demanded, even if computerized copies of Supreme Court opinions were agency records.[73]

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[68] **AFSCME v. Cook Co.**, 136 Ill. 2d. 334, 345; 1990 Ill. LEXIS 60, at 14.

[69] **Brownstone**, 550 N.Y.S.2d 564, 565 (1990).

[70] *Id.* at 564.

[71] **Baizer v. Dep't of the Air Force**, 1995 U.S. Dist. LEXIS 3487.

The Proposed Amendment Bill on Format of Disclosure

Section 5 of the proposed amendment bill requires that agencies make reasonable efforts to provide records in the form or format requested, including in an electronic form.[74] The bill provides that "[a]ny agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency."[75] Even when the records are not maintained in the format requested, the bill requires agencies to make reasonable efforts to provide records in an electronic form requested by any person.[76]

Observations and Discussions

Section 5 of the proposed amendment bill would effectively overrule the **Dismukes** decision, which says that government agencies have no obligation to accommodate requesters' preference of format of information disclosed.[77] However, the provision that requires agencies to "make reasonable efforts" to provide requesters with records that are not maintained in the format requested would like end up being of no use at all because of the ambiguity of the language. The amendment fails to define "reasonable efforts." Based solely on their interpretation of the reasonableness of the effort required to produce requested information, agencies may decide that some requests are unreasonable. Therefore, in an effort to intimidate the requesters, the agencies may charge high fees. This process would leave the basic decision of reasonableness to the agencies. The only decision the requesters would have is whether they are willing to pay the high fees.

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[72] *Id.*

[73] *Id.*, at 11, citing Dismukes, at 762.

[74] *Supra* note 13.

[75] *Id..*, as revised 552(a)(3)(C).

[76] *Id.*, as revised 552(a)(3)(D).

[77] **Dismukes**, at 763.

Two implied, potentially conflicting purposes underlie a provision that requires agencies to "make reasonable efforts" to provide requesters with records that are not maintained in the format requested. One is to show to the public that the legislature is trying hard to meet the public's needs for information by compelling the agencies to do their job. The other is a gesture to the government agencies, saying that if the request is unreasonable, the agencies do not have to provide the records at all. Under these assumptions, it is foreseeable that once the amendment, which contains such a provision, goes into effect, there will be many disputes between record-requesters and agencies with regard to whether the agencies are required to make an effort to accommodate the requesters' needs. Then court judgments would probably be the only solution for such disagreements.

Generally speaking, only two unusual situations should make the agencies' efforts unreasonable. One is that agencies will be asked to convert paper records to a computerized form which does not already exist. The other is that agencies do not have the proper equipment to convert the information from one medium to another. Other than that, if the information requested does exist in computerized form, such efforts as converting or downloading the information from computer tapes to CD ROMs or to computer discs, or vice versa, or even printouts, should all be considered reasonable, on the condition that the agency/agencies have the proper facilities to conduct such conversion or downloading. Such an effort should include writing the programs necessary for data conversion.

C. Computer Redaction

Courts' Rulings on Computer Redaction

For traditional paper records, if requested records contain private information, government agencies are required to delete the restricted portion of the record and release the remaining part.[78] The United States Supreme Court in an earlier case, **Department of Air Force v Rose**, also explicitly ruled that under the privacy exemption of the FOIA,[79] redaction of documents to protect personal privacy is appropriate to permit disclosure of nonexempt portions of otherwise exempt files.[80] However, 13 years later, the same High Court made a contradictory decision when it, in **Department of Justice v. Reporters Committee for Freedom of the Press**,[81] ruled that the FBI's computerized rap sheets could not be disclosed because of the privacy exemption. This is a case involving a CBS news correspondent's seeking access to FBI rap sheets, which are criminal identification records accumulated and maintained by the FBI on more than 24 million persons. Even though the information had once been available to the public in paper form before it was compiled by the FBI, the Court still reversed the United States Court of Appeals for the District of Columbia Circuit's ruling and unanimously held that FBI rap sheets are not public records under the FOIA because the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[82]

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[78] See 5 U.S.C. § 552(b). It provided that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Ironically, Justice Kennedy, the same judge who in **Long v. IRS**[83] acknowledged that FOIA applies to computerized information, filed an opinion concurring in the judgment delivered by Justice Stevens in Reporters Committee.[84] **Reporters Committee** has set a disasterous precedent for people who are seeking access to government-held information -- computerized or non-computerized. Because the Court decided so broadly, many courts in later cases have been citing this Supreme Court decision to justify agencies' denials of access.

The Proposed Amendment Bill on Computer Redaction

Computer redaction issues are addressed in Section 7 of the amendment bill. The legislation would require that when records are provided in electronic form or as a hard copy printout of electronic information, the withholding deletions made in electronic records prior to their public disclosure be indicated to ensure that the requester receives notice of the amount of material deleted and the location of the deletion.[85]

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[79] 5 USCS @ 552(b)(6).

[80] **Dep't of Air Force v. Rose**, 425 U.S. 352 (1976).

[81] **Dep't of Justice v. Reporters Committee**, 489 U.S. 749, 749-751.

[82] *Id.*

[83] **Long**, 596 F.2d 362 (9th Cir. 1979), at 365.

[84] **Dep't of Justice v. Reporters Committee**, at 750.

Observations and Discussions

Although the court did not use the term "computer redaction" in **Long**, it did explicitly instruct that mere deletion of private information does not result in an agency creating a whole new record and that editing required to delete such information from computer data tapes was not an unreasonable burden for the agency.[86] In other words, the United States Court of Appeals for the Ninth Circuit has recognized the importance of FOIA's presumption of openness and implied that even if the computerized records requested cannot be fully disclosed, government agencies should delete the restricted information and release the remaining parts of the records. Instead of making such an across-the-board denial, the Supreme Court in **Reporters Committee** likewise could have ordered a computer redaction be conducted so that unrestricted information could be released.

Although it does not specifically require government agencies to adopt computer redaction in cases in which requested electronic records contain restricted information, the proposed legislation requires that agencies indicate any deletions made in records to ensure that the requester receives notice of the amount of material deleted and the location of the deletion. However, it is arguable that this provision does not have to specify "electronic" or "computer" records because such records would be covered by the definition of "record" provided by the new bill.

D. Fee Waiver and Fee Reduction

Courts' Rulings on Fee Waiver and Fee Reduction

There have not been many fee waiver cases decided for computerized records; however, the fee-waiver guideline the courts have been following for records in the traditional format is clear. In the case of **Eudey v. CIA**, the United States District Court for the District of Columbia set an arbitrary and capricious standard to decide fee-waiver situations.[87] This case involved Elizabeth Eudey, a research associate at the University of California at Berkeley seeking a fee waiver from the CIA for documents concerning relations between the United States and Italian and French trade unions during the post-World War II period. Eudey was also a historian engaged in a study intended for incorporation in a book analyzing the effects of United States foreign policy in the related area.[88] The court said that the CIA's determination not to waive fees, which was based on its assessment that few documents would be released in response to Eudey's request, was arbitrary and capricious. The court said that in a fee-waiver request, the identity of the requester and the nature of the information sought should be the proper factors for the agency to consider.[89] The court added that if after considering such factors the agency concludes that furnishing particular information will not primarily benefit the general public but rather will primarily benefit the individual requester and the agency then denies a request for a fee waiver on that basis, its denial of a waiver will not be arbitrary and capricious.[90] This "arbitrary and capricious" test, or the "public benefit" test, has been adopted by many later cases.[91]

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[85] S. Rep. No. 1090, 104th Cong., 1st Sess. (1995), Section 7.

[86] **Long**, 596 F.2d 362 (9th Cir. 1979), at 366.

As for the information requested for commercial use, the United States Court of Appeals for the Second Circuit decided in **Legi-Tech, Inc. v. Keiper**[92] that commercial information services are entitled to equal access to computerized records. In **Legi-Tech**, a California corporation that markets a computerized information retrieval service,[93] sought to enjoin officials of New York State from denying Legi-Tech access to a state-owned computerized database that contains legislative information and that is available through subscriptions to the general public. Although the Court of Appeals for the Second Circuit did not make a clear ruling because of a lack of certain information, it did emphasize that the First Amendment may prohibit the state from denying the company access to the computerized database.[94]

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[87] **Eudey v. CIA**, 478 F. Supp. 1175 (D.D.C. 1979).

[88] *Id.* at 1176.

[89] *Id.* at 1177.

[90] *Id.*

[91] Among them are: **Blakey v. Dep't of Justice**, 549 F. Supp. 362, 364 (D.D.C. 1982); **Diamond v. FBI**, 548 F. Supp. 1158, 1160 (D.S. N.Y. 1982); **Ettlinger v. FBI,** 596 F. Supp. 867, 874 (D.Mass. 1984). **Badhwar v. Dep't of Air Force**, 615 F. Supp. 698, 707 (D.D.C. 1985); **Larson v. CIA**, 664 F. Supp. 15, 17 and 19 (D.D.C. 1987); and **Wilson v. CIA**, LEXIS 3858, 3 (D.D.C. 1991).

[92] **Legi-Tech, Inc. v. Keiper**, 766 F.2d 728 (2d Cir. 1985).

In the case of **SDC Development Corp. v. Mathews**, SDC sought to obtain a set of databases of the Medical Literature Analysis and Retrieval System (MEDLARS) from the Department of Health, Education and Welfare.[95] SDC offered $500, an amount it said would exceed the cost of search and duplication of the tapes.[96] However, the United States Court of Appeals for the Ninth Circuit held that the database, which was developed by the National Library of Medicine and was distributed to institutions nationwide, is not an "agency record" under the FOIA even though it is available on a subscription basis.[97] Thus, the court said, the National Library of Medicine did not have to provide the MEDLARS tapes for the nominal cost of duplication.[98]

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[93] *Id.* at 731. This service offers to subscribers computerized legislative information concerning the New York and California legislatures. The information provided includes summaries of pending legislation, votes on bills, attendance and voting records of individual legislators, and campaign contributions to individual legislators. Its customers include lobbyists, news media, corporations, and governmental agencies.

[94] *Id.*

[95] **SDC Development Corp. v. Mathews**, 542 F.2d 1116 (9th Cir. 1976).

[96] *Id.* at 1118. MEDLARS is a computerized system for storing, indexing, and retrieving medical bibliographical data. The tapes store citations and abstracts of two million articles from approximately 3000 medical and scientific journals published throughout the world. The National Library continuously updates these tapes.

[97] *Id.*

[98] *Id.* at 1121. Direct access to the MEDLARS data bank was available on a subscription basis through MEDLINE, the National Library's on-line terminal reference retrieval system. A user may purchase the complete data bank through the National Technical Information Service for $50,000.

The Proposed Bill on Fee Waiver and Reduction

The amendment bill makes no special modification to the fee-charging policy for requesting information. This omission thus leaves the original version of fee-waiver guidelines to be applied to computerized information.

Observations and Discussions

Under the current FOIA, the fees that government agencies charge for records should be limited to reasonable standard charges for document duplication when records are not sought for commercial use.[99] The fee should be waived or reduced if disclosure of the information is in the public interest and is not in the commercial interest of the requester.[100] The FOIA also provides that even if the information requested is for commercial use, fees also should be limited to reasonable standard charges for document search, duplication and review.[101]

These guidelines and court rulings, however, do not provide enough support for fee-waiver requests. Many questions remain unanswered. In fact, the responses to a survey of the news media show that the FOIA has not been effective for resolving problems involving costs for computer records.[102] Respondents reported that federal government agencies, generally speaking, did not have a consistent or uniform policy. Some agencies would charge a high fee apparently to intimidate requesters. Also, as more and more agencies are reselling their computerized data to private vendors through contracts, the public's right of access to such information directly from the agencies has been infringed since the public can only get the data through a subscription to the commercial services. If such a practice prevails for all the government agencies at the federal level and becomes a common phenomenon, it is foreseeable that the public's right of access to computerized records will be minimized. No matter how much the FOIA has been improved to recognize computerized information as a public record, it would become only a useless law if virtually all the computerized records come under the control of commercial vendors. Therefore, it is very important that the lawmakers stop this potentially dangerous situation and recognize the seriousness of this problem when they are amending the FOIA.

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[99] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[100] *Id*, § 552(a)(4)(A)(iii).

[101] *Id*, § 552(a)(4)(A)(ii)(I).

[102] Hsiao-yin Hsueh, unpublished Master's Thesis, An Analysis of the Freedom of Information Act and News Media Access to Electronically-Stored Government Record, Chapter 3: Survey and Findings in the "Time Limit" section (1995).

Another complicated and confusing situation in the fee-waiver issue is the question of who is entitled to a fee waiver. FOIA provides that the fee should be waived or reduced if disclosure of the information is in the public interest and is not in the commercial interest of the requester. But what are the definitions of "public interest" and "commercial interest" are often not mutually exclusive. Journalists use government information to pursue stories that are of public interest. But they and their organizations also earning a living by the selling of publications and airing programs. Scholars uses government information to enhance their academic disciplines' pursuits and benefit later researchers. But their books, which are published based on the information obtained from the government, can also produce profit. On the other hand, although commercial requesters amass monetary benefits from subscribers by distributing data compiled from government agencies, they also provide information services to the general public so convenient to use that people can retrieve any information they want at any time, saving time and energy. All the requesters in a way are the same; they all provide services (with different means) to serve their respective purposes and to make a profit from the information.

Therefore, to assure that "anyone" can have an equal opportunity to access computerized information for a fair fee, the amended FOIA need not limit commercial requesters' access, nor should it limit the public's access by permitting the contracting of information for certain commercial users' exclusive use. All the requesters should be charged a standard fee -- for duplication of data and time, regardless of purpose of use. Thus, under such a uniform fee policy, each requester will have equal access to the information they need, small or large volumes, with a standard fee and all commercial vendors who desire to obtain information and resell it will have equal opportunity to compete. Since the information will not be exclusively controlled by one single distributor, the fee for the public to subscribe to the services should reach a reasonable range through competition. And thus the rest of the public can have more choices as to the source from which they obtain information. If requests are simple, requesters might want to go directly to the agency, but if the search is voluminous and complicated, they may also consider obtaining the information through private services, which have arranged the information in such a way that people can conveniently retrieve and use it.

E. Time Limit

Courts' Rulings on Time Limit

Like the fee-waiver issue, few time-limit decisions have been made which specifically address computerized records. In the case of **Open America v. The Watergate Special Prosecution**, a law professor and students from a law school sought disclosure of government records regarding the role of the former Acting Director of the FBI, L. Patrick Gray, in any aspect of the Watergate affair.[103] In the requesting letters, the group said that "failure to reply to this request within the ten-day period provided by the Act will be treated as a denial of the request, and appeal will be sought."[104] The FBI replied to the requesters, noting that the request had been received and that on the day of receipt the FBI had 5,137 FOIA requests on hand, 1084 of which were in various stages of completion.[105] At the time, the United States Court of Appeals for the District of Columbia Circuit was hearing the case, the FBI said that over 38,000 pages have been located and still needed to be reviewed and among those 9,800 pages were directly relevant to the Watergate investigation and Gray's confirmation hearings.[106] The FBI said that it estimated that the review would be completed by around August 1976, with any appeal to be completed within three additional months.[107] The court said that as long as the agency can show it has inadequate resources to process FOIA requests within the statutory time limit and that the agency is exercising due diligence by processing requests on a first-in, first-out basis, then "exceptional circumstances" exists and the agency can have additional time to process the requests.[108]

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103 **Open America**, at 608 and 609 (D.C. Cir. 1976).

104 *Id.* at 608.

105 *Id.*

106 *Id.* at 612.

107 *Id.* at 613. The group's FOIA request was filed in October, 1975.

108 *Id.* at 616, citing the FOIA, 5 U.S.C. @ 552(a)(6)(C).

The Proposed Amendment Bill on Time Limit

In the amendment, time limits were addressed in Section 6. The amended FOIA would authorize courts to award out-of-pocket expenses incurred by the person making a request, as well as attorney fees incurred in the administrative process in any case in which the agency has failed to comply with the time-limit provisions.[109]

This section also would extend the time limit from 10 to 20 working days. The extension is intended to help agencies comply with statutory time limits, while leaving the 10-working days time limit for cases involving unusual circumstances.[110] As an incentive, the amendment would permit agencies to retain half of the FOIA fees collected if agencies comply with the time limit so that they could use those fees to enhance the FOIA processing.[111]

Under the current FOIA, agencies may have additional time to respond to a request, but only under exceptional circumstances.[112] To avoid agencies' continuing to use such an excuse as agency backlogs to justify their delays as exceptional circumstances, the amendment would mandate that such circumstances should not include delays that result from a predictable workload, including any ongoing agency backlog, in the "ordinary course of processing requests for records."[113]

Observations and Discussions

According to a 1986 House report, the time limit issue is the "single most frequent complaint about the operation of the FOIA."[114] The report said that the reasons for delays include inadequate resources, unnecessary bureaucratic complexity, political interference with the disclosure process, poor organization of agency records, and lack of interest by agencies in disclosure.[115]

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[109] S. Rep. No. 1090, 104th Cong., 1st Sess. (1995), as revised 552(a)(4)(E).

[110] *Id.* at 16.

[111] *Id.*

[112] 5 U.S.C. §552(a)(6)(C).

[113] *Id.* at 3.

[114] *Id.* at 16.

This observation echoes the findings of the survey in the Hsueh study -- that federal government agencies have also performing poorly in complying with the FOIA's time limit for providing computerized information.[116] One significant issue regarding time limits that government agencies should recognize is the distinction between "responding" to and "complying" with requests within the time limit. The mere "responding" within the statutory time limit by sending an acknowledgement letter should not be regarded as "complying" within the time limit. To comply, the agencies should furnish requesters with the requested information within the time limit. Therefore, it is important that Congress note this problem and address it in the amendment bill.

SUMMARY OF THE FINDINGS

Although the current version of the FOIA does not mention computerized information, courts have generally agreed that such information is a record under the Act. However, because of the lack of consensus over what constitutes a record, federal government agencies have been reluctant and resistant to recognize FOIA's application to computerized records. The Senate amendment bill, S.1090,[117] would finally define the term "record" and include computerized information under the definition.

Concerning the format of disclosure, the courts have been inconsistent about whether requesters have the right to choose information stored in a particular format. Senator Leahy's bill, which would require that agencies make reasonable efforts to provide records in the form or format requested, would resolve the confusion caused by the courts' inconsistencies. Even when the records are not maintained in the format requested, the bill requires agencies to make reasonable efforts to provide records in the electronic form requested by any person.

However, the part of this provision that requires agencies to "make reasonable efforts" could prove to be of no use because of the ambiguity in the language. If the criterion used to determine whether the effort is reasonable is simply whether the requesters agree to pay the cost, a dangerous situation might happen. Agencies might charge a high fee to intimidate requesters and then maintain that the efforts required to accommodate the requesters' preferences are, therefore, unreasonable.

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[115] *Id.* citing H.R. Rep. 99-832, Sept. 17, 1986, pp. 11-12.

[116] *Supra* note 102.

[117] S. Rep. No. 1090, 104th Cong., 1st Sess. (1995).

On the issue of computer redaction, the courts in an early case did recognize that mere deletion of private information would not result in an agency's creating a whole new record and that editing required to delete such information from computer data tapes is not an unreasonable burden for the agency. However, in 1989 the Supreme Court upheld the FBI's withholding of information without ordering that a computer redaction be conducted so that the disclosable part of the record could be released. This broad ruling has set a disasterous precedent for requests for both computerized and non-computerized records.

Although the legislation proposed by Leahy requires that agencies indicate the withheld deletions made in electronic records to ensure that the requester receives notice of the amount of material deleted and the location of the deletion, the legislation does not specifically require government agencies to adopt computer redaction in cases in which requested electronic records contain restricted information. Since the responses of a survey of news media professionals shows that agencies are not very efficient in adopting redaction for computerized records, it is important that the requirement for computer redaction be included in the provisions.[118]

In fee-waiver issues, the FOIA and courts have failed to provide adequate guidelines and solutions. The responses to the Hsueh survey, on the other hand, show that federal government agencies have a haphazard policy for charging fees for computerized information. As more and more agencies are reselling their computerized data to private vendors through contracts, the public's right to access such information directly from the agencies has been greatly infringed. Therefore, it is important that Congress provides clear guidelines for agencies so that each requester will have equal access to computerized records at a reasonable and fair cost.

The time limit issue is the single most frequent complaint about the operation of the FOIA. However, the courts generally have agreed with or supported agencies' delays. The amended FOIA would authorize courts to award out-of-pocket expenses incurred by a person making a request, as well as attorney fees incurred in the administrative process in any case in which the agency has failed to comply with the time-limit provisions. The amendment would also expand the time limit from 10 days to 20 days. As an incentive, the amendment would permit agencies to retain half of the FOIA fees collected if the agencies comply with the time limit. Agencies could then use those fees to enhance the FOIA processing. To avoid agencies' continuing to use the excuse of agency backlogs to justify their delays as exceptional circumstances, the amendment would mandate that such circumstances should not include delays that result from a predictable workload, including any ongoing agency backlog, in the "ordinary course of processing requests for records."[119] Under the proposed legislation, government agencies would have to recognize that in order to comply with FOIA's statutory time limit, they need to be able to furnish requesters with the information requested, not just send an acknowledgement letter.

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[118] *Supra* note 102, the "Computer Redaction" section.

CONCLUSIONS

With the above-mentioned findings, several conclusions are drawn from this research. First of all, the study has shown that the current FOIA has failed to provide sufficient guideline for access to computerized government information. The insufficiency of the law has resulted in the inconsistency among the federal government agencies and courts in deciding on such aspects of accessing computer records as format of disclosure, computer redaction, time limit and cost. Second, although Congress has proposed a bill to amend the FOIA, this research has demonstrated that the proposed amendments would still not be sufficient to solve the problems. If the bill were passed into law without further modifications, it is foreseeable that many problems would still exist.

This study concludes with suggestions and recommendations to Congress, which has been trying to improve the FOIA and with recommendations to the federal governmental agencies which are processing those requests.

Suggestions to Congress Regarding Proposed Amendment Bill:

Definition of "Record"

- Retain the provision that defines a "record" as: "all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics."[120] Such a definition, which specifically includes "machine-readable materials... regardless of physical form or characteristics," would provide a clear guideline for the government agencies to recognize that computer records, if requested, can be information disclosable under the FOIA. Thus, unnecessary delays or denials can be avoided.

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[119] *Supra* note 13 at Section 6.

Format of Disclosure

- Retain the provision which says that "[a]ny agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency."[121] Since the "record" will have been clearly defined to include computerized information, this provision will help prevent situations such as that of **Dismukes** from happening again.[122]

- Modify or remove the part that states that "even when the records are not maintained in the format requested, the bill requires agencies to make reasonable efforts to provide records in an electronic form requested by any person."[123] The term "reasonable efforts" is stated too broadly. A definition of "reasonable efforts" should be added.

- Add a provision to stress that individual requesters' right of access to computerized records should not be infringed upon because of an agency's contract with a private vendor.

Computer Redaction

- To the provision which reads, "...To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details"[124] add the following language: "from the records (including but not limited to electronically stored information)."

This addition may seem unnecessary, but, in fact, it is needed because although under the FOIA, redaction should have applied to both paper and computer records, agencies could still be reluctant to conduct a redaction on computer records because it may require additional effort such as programming. The insertion of the additional language would further assure computerized records being covered under the domain of "redaction."

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[120] *Id.* at 4, as revised 552(f)(2).

[121] *Id.* at 3, as revised 552(a)(3)(C).

[122] **Dismukes v. DOI**, 603 F. Supp 760 (D.D.C. 1984). The court ruled that agencies had no obligation under the FOIA to accommodate requesters' preferences for the format of information.

[123] *Supra* note 13, as revised 552(a)(3)(D).

[124] *Id.*, as revised 5 U.S.C. § 552 (a)(2)(E).

- Retain the part that states "...in each case the justification for the deletion shall be explained fully in writing and the extent of such deletion shall be indicated on the portion of the record which is made available or published at the place in the records where such deletion was made...."[125] This provision would serve the same function as the previously mentioned provision. The indication of deletion of records applies not only to paper records but also to computer records.

- Add a provision which will provide a uniform policy as to any fee to be assessed for programming required for computerized redaction. Requesters will either not be charged such a fee or all be charged a standard fee based upon the complexity or time involved in programming. The author is more in favor of the latter because the complexity and time required for programming differ from one case to another.

Fee

- Retain all fee provisions in the FOIA amendments.[126] Although survey respondents' common complaint was that agencies do not have a uniform policy in charging a fee for computerized records, it is hopeful that agencies will change and start to have a consistent policy once the amended FOIA goes into effect with computerized records covered under the definition of "records."

- Add explanations or definition for "commercial purposes," "commercial use" and "commercial interest." If the FOIA is to treat all requesters equally, they should have equal access to the records at a standard fee. However, if agencies charge differently based on whether the records are for commercial or non-commercial purposes, an amendment to the FOIA should then clearly define what is commercial purpose, what is non-commercial purpose, and what is public interest. The original classification of such a purpose under the FOIA is not clear and persuasive enough.[127]

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[125] *Id.*

[126] *Id.*, as revised 5 U.S.C. § 552(a)(4)(A), (i)-(viii).

[127] *Supra* note 102, the "Fee Waiver"section.

Time Limit

- Modify the proposed time limit provision, (6)(A)(i), which says:

> Each agency...shall -- determine within 20 days after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination....[128]

The time limit needs to be restored to the current 10 days for the agency to determine whether to comply with the request. Then the agency would have another 20 days to furnish the requester with the records requested if it determines that they are disclosable. Since for many of the requesters, the most important issue is not just a response but whether an agency will release the information within the time limit, it is important that the amendment include such mandatory language.[129]

- Retain the rest of the provisions, including the ones that would award attorney fees and court costs.

Penalties for Failure to Comply with the FOIA

In addition to above-mentioned recommendations and suggestions, Congress should also include some punishment measures in the amendment for agencies and/or records custodians who do not comply with the FOIA. States that have included civil and/or criminal punishments in their open records statutes may serve as models for the federal FOIA's amendment. For example, Florida's access law provides that a public officer who knowingly violates the provisions of the state's open-record statute is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree.[130] Arkansas' FOIA says that any person who violates the Act will be guilty of a misdemeanor and will be punished by a fine of not more than $200 and/or 30 days in jail and/or a sentence of public service.[131] Nebraska has even more severe penalties for the officer who violates the state public records statutes. Such a person can be subject to removal or impeachment and can be guilty of a Class III misdemeanor.[132] Such misdemeanor can be punished by up to three months in prison and/or a $500 fine.[133] To some extent, federal agencies' unwillingness to comply with the FOIA is due to the law's lack of enforcement teeth. Therefore, if certain punishment measures are included in the law, the agencies' willingness to comply with the law should be greatly increased.

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[128] 5 U.S.C. § 552(a)(6)(A)(i).

[129] *Supra* note 102, the "Time Limit" section.

[130] Fla. Stat. Ch. 119.02.

[131] Ark. Code Ann. § 25-19-104.

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[132] Neb. Rev. Stat. § 84-712.09.

[133] Neb. Rev. Stat. § 28-106. Other states that have criminal/civil penalties include Iowa (§ 22.6: a "simple misdemeanor" and § 22.10.3(c): impeachment if two prior violations); Louisiana (§ 44:37: $100-$1,000 and 1-6 months for a first conviction, or both, and then $250-$2,000 and 2-6 months, or both); Nevada (§239.010: a misdemeanor); New Mexico (§239.010.2: a misdemeanor); North Dakota (§ 44-04-18: "punishable as an infraction"); Oklahoma (§ 24A.17: $500 and/or one year in jail); South Carolina (§ 30-1-140: $50 per month of refusal); Vermont (§ 1-314(a): $500 fine); West Virginia (§ 29B-1-6: $100-$500 fine, up to 10 days in jail); and Wyoming (§ 16-4-205: $100 fine). States that have only civil fines for non-compliance with the open records laws include Kentucky (§ 61.882(5): $25 per day of denial paid to the complainant); Louisiana (§ 44:35(e)(1): $100 per day and actual damages); Missouri (§ 610.027.3: $300 fine); Rhode Island § 38-2-9(d): not exceeding $1,000 for "willful violation"); Virginia (§ 2.1-346.1, $25-$1,000 to be paid to the State Literary Fund); and Washington (§ 42.17.340: $25 per day paid to the complainant.). Source: Sandra Davidson Scott, "Statutory Language Needed: Access to Computerized Government Records Must Be Made Easier," 8 Editor & Publisher 12 (Nov. 2, 1991).

APPENDIX

Text Of the Senate Bill (S. 1090) to Amend The Freedom Of Information Act

104th Congress 1st Session S. 1090 (July, 1995)

SECTION 1. SHORT TITLE. This Act may be cited as the "Electronic Freedom of Information Improvement Act of 1995".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.-The Congress finds that-

(1) the purpose of the Freedom of Information Act is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies (subject to statutory exemptions) for any public or private purpose;

(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

(6) Government agencies should use new technology to enhance public access to agency records and information.

(b) PURPOSES.-The purposes of this Act are to-

(1) foster democracy by ensuring public access to agency records and information;

(2) improve public access to agency records and information;

(3) ensure agency compliance with statutory time limits; and

(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

SEC. 3. PUBLIC INFORMATION AVAILABILITY.

Section 552(a)(1) of title 5, United States Code, is amended-

(1) in the matter before subparagraph (A) by inserting "by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "Federal Register";

(2) by striking out "and" at the end of subparagraph (D);

(3) by redesignating subparagraph (E) as subparagraph (F); and

(4) by inserting after subparagraph (D) the following new subparagraph: "(E) a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection (b)(3) of this section', together with a specific description of the scope of the information covered; and".

SEC. 4. MATERIALS MADE AVAILABLE IN ELECTRONIC FORMAT AND INDEX OF RECORDS MADE AVAILABLE TO THE PUBLIC.

Section 552(a)(2) of title 5, United States Code, is amended-

(1) in the matter before subparagraph (A) by inserting ", including, within 1 year after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1995, by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "copying";

(2) in subparagraph (B) by striking out "and" after the semicolon;

(3) in subparagraph (C) by inserting "and" after the semicolon;

(4) by adding after subparagraph (C) the following new subparagraphs:

"(D) an index of all major information systems containing agency records regardless of form or format unless such an index is provided as otherwise required by law;

"(E) a description of any new major information system with a statement of how such system shall enhance agency operations under this section;

"(F) an index of all records which are made available to any person under paragraph (3) of this subsection; and

"(G) copies of all records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records under paragraph (3) of this subsection;";

(5) in the second sentence by striking out "or staff manual or instruction" and inserting in lieu thereof "staff manual, instruction, or index or copies of records, which are made available under paragraph (3) of this subsection"; and

(6) in the third sentence by inserting "and the extent of such deletion shall be indicated on the portion of the record which is made available or published at the place in the record where such deletion was made" after "explained fully in writing."

SEC. 5. HONORING FORMAT REQUESTS.

Section 552(a)(3) of title 5, United States Code, is amended by-

(1) inserting "(A)" after "(3)";

(2) striking out "(A) reasonably" and inserting in lieu thereof "(i) reasonably";

(3) striking out "(B)" and inserting in lieu thereof "(ii)"; and

(4) adding at the end thereof the following new subparagraphs:

"(B) An agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency.

"(C) An agency shall make reasonable efforts to search for records in electronic form or format and provide records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format.".

SEC. 6. DELAYS.

(a) FEES.-Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end thereof the following new clause: "(viii) If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of paragraph (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts."

(b) PAYMENT OF THE EXPENSES OF THE PERSON MAKING A REQUEST.-Section 552(a)(4)(E) of title 5, United States Code, is amended by adding at the end thereof the following: "The court may assess against the United States all out-of-pocket expenses incurred by the person making a request, and reasonable attorney fees incurred in the administrative process, in any case in which the agency has failed to comply with the time limit provisions of paragraph (6) of this subsection. In determining whether to award such fees and expenses, a court should consider whether an agency's failure to comply with statutory time limits was not warranted and demonstrated bad faith or was otherwise unreasonable in the context of the circumstances of the particular request.".

(c) DEMONSTRATION OF CIRCUMSTANCES FOR DELAY.-Section 552(a)(4)(E) of title 5, United States Code, is further amended-

(1) by inserting "(i)" after "(E)"; and

(2) by adding at the end thereof the following new clause:

"(ii) Any agency not in compliance with the time limits set forth in this subsection shall demonstrate to a court that the delay is warranted under the circumstances set forth under paragraph (6) (B) or (C) of this subsection."

(d) PERIOD FOR AGENCY DECISION TO COMPLY WITH REQUEST.-SECTION 552(A)(6)(A)(I) is amended by striking out "ten days" and inserting in lieu thereof "twenty days".

(e) AGENCY BACKLOGS.-Section 552(A)(6)(C) Of Title 5, United States Code, is amended by inserting after the second sentence the following: "As used in this subparagraph, the term 'exceptional circumstances' means circumstances that are unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.".

(f) NOTIFICATION OF DENIAL.-The last sentence of section 552(a)(6)(C) of title 5, United

States Code, is amended to read: "Any notification of any full or partial denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and the total number of denied records and pages considered by the agency to have been responsive to the request.".

(g) MULTITRACK FIFO PROCESSING AND EXPEDITED ACCESS.-Section 552(a)(6) of title 5, United States Code, is amended by adding at the end thereof the following new subparagraphs:

"(D) (i) Each agency shall adopt a first-in, first-out (hereafter in this subparagraph referred to as FIFO) processing policy in determining the order in which requests are processed. The agency may establish separate processing tracks for simple and complex requests using FIFO processing within each track.

"(ii) For purposes of such a multitrack system-

"(I) a simple request shall be a request requiring 10 days or less to make a determination on whether to comply with such a request; and

"(II) a complex request shall be a request requiring more than 10 days to make a determination on whether to comply with such a request.

"(iii) A multitrack system shall not negate a claim of due diligence under subparagraph (C), if FIFO processing within each track is maintained and the agency can show that it has reasonably allocated resources to handle the processing for each track."(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and a showing by the person making such request of a compelling need for expedited access to records, the agency shall determine within 5 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request, whether to comply with such request. No more than one day after making such determination the agency shall notify the person making a request for expedited access of such determination, the reasons therefor, and of the right to appeal to the head of the agency. A request for records to which the agency has granted expedited access shall be processed as soon as practicable. A request for records to which the agency has denied expedited access shall be processed within the time limits under paragraph (6) of this subsection.

"(ii) A person whose request for expedited access has not been decided within 5 days of its receipt by the agency or has been denied shall be required to exhaust administrative remedies. A request for expedited access which has not been decided may be appealed to the head of the agency within 7 days (excepting Saturdays, Sundays, and legal public holidays) after its receipt by the agency. A request for expedited access that has been denied by the agency may be appealed to the head of the agency within 2 days (excepting Saturdays, Sundays, and legal public holidays) after the person making such request receives notice of the agency's denial. If an agency head has denied, affirmed a denial, or failed to respond to a timely appeal of a request for expedited access, a court which would have jurisdiction of an action under paragraph (4)(B) of this subsection may, upon complaint, require the agency to show cause why the request for expedited access should not be granted, except that such review shall be limited to the record before the agency.

"(iii) The burden of demonstrating a compelling need by a person making a request for expedited access may be met by a showing, which such person certifies under penalty of perjury to be true and correct to the best of such person's knowledge and belief, that failure to obtain the requested records within the timeframe for expedited access under this paragraph would-

"(I) threaten an individual's life or safety;

"(II) result in the loss of substantial due process rights and the information sought is not otherwise available in a timely fashion; or

"(III) affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage."

SEC. 7. COMPUTER REDACTION.

Section 552(b) of title 5, United States Code, is amended by inserting before the period in the sentence following paragraph (9) the following: ", and the extent of such deletion shall be indicated on the released portion of the record at the place in the record where such deletion was made".

SEC. 8. DEFINITIONS.

Section 552(f) of title 5, United States Code, is amended to read as follows:

"(f) For purposes of this section-

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) the term 'record' means all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics; and

"(3) the term 'search' means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a)(3)(A) of this section.".

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Opening the Doors to Juvenile Court: Is There An Emerging Right of Public Access?

A Law Division top three student paper
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INTRODUCTION

Three teenagers are arraigned on hate crime charges in U.S. District Court. The judge refuses to let reporters attend any hearings in the case and orders that any information that could identify the juveniles be deleted from case records before they are released to the press. A newspaper appeals the judge's order, but a federal appeals court affirms the decision and declares that juvenile proceedings in federal court are presumptively closed. Believing that important rights are at stake, the newspaper petitions for U.S. Supreme Court review, arguing that the First Amendment creates a right of public access to juvenile court proceedings.

This is precisely what happened in *United States v. Three Juveniles*, a case involving *The Boston Globe*. The Globe Newspaper Co. filed a petition for writ of certiorari in November 1995,[1] and the U.S. Supreme Court denied review on April 29, 1996.[2]

The Globe case involved the Federal Juvenile Delinquency Act, which allows juveniles to be tried in federal court under certain circumstances.[3] Comparatively few juvenile cases are tried in federal court; most are tried in state juvenile courts. And actions taken by several states in recent years suggest that there may be a trend towards greater public access.

For example, Georgia amended its juvenile code in 1995 to create a presumption of public access to juvenile hearings in cases in which a juvenile is charged with certain designated felonies, such as kidnapping and attempted murder.[4] A new law enacted in

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[1] United States v. Three Juveniles, Globe Newspaper Co., Intervenor-Appellant, 61 F.3d. 86 (1st. Cir. 1995), *petition for cert. filed*, Globe Newspaper Co. v. United States, 64 U.S.L.W. 3399, 3507-8 (U.S. Nov. 24, 1995) (No. 95-815). See also *Massachusetts: Federal Juvenile Delinquency Act Does Not Require Closed Juvenile Hearings and Records*, The News Media & The Law, Fall 1995, at 8-9.

[2] 64 U.S.L.W. 3719-20, 3722 (U.S. April 29, 1996).

[3] 18 U.S.C. §§ 5031-5042.

[4] O.C.G.A. § 15-11-28(c.1)(1) (Supp. 1995). *See also* Monica L. Mash, Legislative review, Courts, *Juvenile Proceedings, Parental Rights: Provide for Public Access to Juvenile Court Proceedings and Records; Provide for Fingerprinting of Certain Juvenile Offenders; Provide for Victim Notification Upon Release or Parole of Violent Juvenile Offenders and School Notification of Certain Juvenile Offenders*, 12 Ga. St. U.L. Rev. 80 (1995).

Missouri that year "removes the veil of secrecy that once kept juvenile court proceedings private – in the hope that allowing names and photos in newspapers will discourage teen crime and alert school officials."[5] Also in 1995, the Indiana General Assembly passed two major laws that provide greater public access to many juvenile court proceedings and records.[6] And in 1988, Michigan created what one writer called "one of the most open juvenile court systems in the country" by granting public access to court proceedings and documents in cases involving delinquents, truants, runaways and abuse victims.[7] These actions followed the U.S. Supreme Court's decisions in *Richmond Newspapers v. Virginia* and later cases, which held that the press and public have a right of access under the First Amendment to attend the criminal trials of adults.[8]

The purpose of this paper is to determine whether there is an emerging right of access to juvenile court proceedings, and whether there is a First Amendment basis for such a right of access consistent with the U.S. Supreme Court's public access doctrine as expressed in *Richmond Newspapers* and its progeny. The answers to these questions are of immense importance to those on both sides of the issue. Advocates of private hearings contend that allowing publicity would result in irreparable harms to juveniles, such as limiting a juvenile's future educational and employment opportunities. In contrast, advocates of public access point to statistics showing a dramatic increase in violent crimes committed by juveniles[9] and argue that the public has a right to know how juvenile courts are dealing with the problem, and that holding juvenile hearings in secret breeds public mistrust of the juvenile justice system.

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[5] Laurel Shaper Walters, *States Try to Rewrite Crime & Punishment*, Christian Science Monitor, Dec. 5, 1995, § THE U. S., at 1.

[6] *Juvenile laws*, Indianapolis News, June 22, 1995, at A3.

[7] Andrea Neal, *Forcing children's systems to account*, Indianapolis Star, April 13, 1995, at A16.

[8] 448 U.S. 555 (1980).

[9] For example, the U.S. Justice Department reported in March 1996 that the number of murders committed by teens tripled between 1984 and 1994. *See* Ronald J. Ostrow, *Number of juvenile murderers is soaring; Crime: The total tripled in the last decade, Justice Dept. study finds. The use of guns quadrupled, underscoring the role of firearms in the violence.* Los Angeles Times, Home Edition, March 8, 1996, at 18A.

In addition, the news media have been trying to gain access to juvenile courts for more than 40 years.[10] The *Globe* case demonstrates that juvenile court access is still an issue important to the news media, and the fact that the U.S. Supreme Court denied review means that the conflict between advocates of private hearings and advocates of public access will continue to be waged at both the state and federal court levels for the foreseeable future.

A BRIEF HISTORY OF JUVENILE JUSTICE IN THE UNITED STATES

At the time the United States' Constitution was written, the common law considered children to have reached the age of criminal responsibility at age seven. Thus, as the U.S. Supreme Court noted *In re Gault* in 1967, under the common law children seven and older "were subjected to arrest, trial, and in theory to punishment like adult offenders."[11] Juveniles convicted of crimes were incarcerated with "hardened adult criminals" and courts in the eighteenth and nineteenth centuries occasionally even sentenced juvenile convicts to death.[12] But, as Stephen Jonas noted, reformers in the mid-1850s began to believe that the focus of juvenile treatment should be rehabilitation instead of punishment, and that "treatment at an early stage could prevent crystallization of the juvenile's criminal tendencies."[13]

Reform efforts ultimately led to passage of the Illinois Juvenile Court Act in 1899. Illinois was the first state to create a separate court system for juveniles, and the Act "gave rise to some of the features of present day juvenile courts including confidential records, private hearings, and procedural informality."[14] By 1925, all but two states had enacted juvenile court acts, and by 1951 all of the states then in the union had done so.[15] These state laws firmly established "an informal, non-adversarial system in which the State acted as *parens patriae"* – which literally means "country (or state) as parent" – "rather than as prosecutor and judge."[16]

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[10] Gilbert Geis, *Publicity and Juvenile Court Proceedings,* 30 Rocky Mtn. L. Rev. 101, 118-19 and 122 (1958).
[11] 387 U.S. 1, 16 (1967).
[12] Stephen Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 Colum. J.L. & Soc. Probs. 287, 288 (1982).
[13] *Id.*
[14] *Id.* at 290.
[15] Geis, *supra note 10,* at 105.

The goal of juvenile court proceedings, under this philosophy, was guidance and rehabilitation rather than determination of guilt or innocence and imposition of punishment. Private hearings were considered essential "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."[17] Public identification of juvenile offenders was considered to "seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public."[18] This philosophy was reflected in a 1923 policy statement by The Children's Bureau of the federal government, which declared: "There should be no publicity in a juvenile court case. The hearings should be private, with no one present other than those directly concerned in the case."[19]

However, not all of the state juvenile court acts required private hearings. In 1939, for example, the laws of only six states and the District of Columbia *required* private hearings in juvenile court, while 24 states *permitted* exclusion of the public.[20] One writer noted in 1958, "[T]hese figures still reflect the state of affairs quite accurately, though there have been a few additions and subtractions from the line-up."[21] And in 1967, the Supreme Court observed that the "claim of secrecy" in juvenile court was "more rhetoric than reality."[22]

In fact, some states began taking steps to lift the shroud of secrecy over juvenile courts as early as 1952. In that year, the Virginia General Assembly "decided to admit to juvenile hearings persons having an interest in the trial," and Congress gave juvenile judges of the District of Columbia discretion to decide what hearings could be opened and who could attend.[23] The Children's Bureau in 1954 issued a new policy statement recommending, "The judge should be allowed at his discretion to permit persons having an interest in the work of the court, such as ... representatives of the press, to attend hearings and observe the work of the court, with the understanding that no publication be made of the names of children or families involved, or their identities otherwise indicated."[24] In 1957, Arizona and Florida opened juvenile court proceedings to the press.[25] The current status of state juvenile court access statutes will be discussed in detail later in the paper.

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[16] Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?* 15 B.C. Third World L.J. 359, 370 (1995).
[17] In re Gault, 387 U.S. at 24.
[18] Smith v. Daily Mail Publishing Co., 443 U.S. 97,107-108 (1979) (Rehnquist, J., concurring).
[19] *Juvenile Court Standards* 5, Child. Bur. Pub. No. 121 (2d ed. 1937), as cited in Geis, *supra note 10*, at 114.
[20] Jonas, *supra note 12*, at 294-295. *See also* Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 Mich. L. Rev. 1540 n. 72 (1983).
[21] Geis, *supra note 10*, at 117.
[22] In re Gault, 387 U.S. at 24.

The history of juvenile proceedings in federal court followed a progression similar to that of the state courts. The Federal Juvenile Delinquency Act was enacted in 1938 and since has been amended.[26] Prior to its passage, a juvenile charged with violating a federal law was treated "in the same manner as an adult."[27] But under the Act, juveniles generally can not be prosecuted in federal trial courts unless state authorities are unable or unwilling to pursue the case in state court, or the juveniles are charged with committing certain federal offenses. And even though the act provides that records of juvenile cases tried in federal court will be confidential, courts frequently have held open proceedings under the Act.[28]

Finally, the U.S. Supreme Court in the mid-1960s began to hear cases challenging juvenile court practices and concluded that the lack of procedural formality had resulted in what Joseph Sanborn called "a history of abuse in juvenile courts."[29] In *Kent v. United States,* the Court held that before a juvenile case can be transferred for prosecution in adult criminal courts, the juvenile is entitled to a transfer hearing and a statement of reasons for the decision reached.[30] The Court wrote in *Kent*, "There is evidence, in fact, that there may be ground for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[31]

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[23] Geis, *supra note 10*, at 120.

[24] *Standards for Specialized Courts Dealing with Children*, 59 Child. Bur. Pub. No. 346 (1954), as cited in Geis, *supra note 10*, at 115.

[25] *Id.* at 121.

[26] 18 U.S.C. §§ 5031-5042. Provisions of the Act will be discussed in more detail later in the paper.

[27] United States v. Borders, 154 F. Supp. 214,25 (N.D. Ala. 1957), *aff'd* 256 F.2d 458 (5th Cir. 1958), as cited in the *Petition for Writ of Certiorari* of the petitioner in *Globe Newspaper Co. v. United States* (No. 95-815) at 16.

[28] Petition for Writ of Certiorari, *supra note 27*, citing Nieves v. United States, 280 F. Supp. 994, 1006 (S.D.N.Y. 1968).

[29] Joseph B. Sanborn Jr., *The right to a public jury trial: a need for today's juvenile court*, 76 Judicature 230, 231 (February-March 1993).

One year later, the Court ruled in *Gault* that juveniles in delinquency proceedings are entitled to due process rights such as the right to notice of charges in advance of the hearing, the right to be represented by an attorney, the right to confront and cross-examine hostile witnesses and the privilege against self-incrimination.[32] The Court wrote in *Gault*, "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[33] Later decisions required proof beyond a reasonable doubt for adjudications of delinquency[34] and extended the prohibition against double jeopardy to juvenile cases.[35]

However, in *Gault* the Court stated that extending due process protections to juveniles did not require an end to confidentiality.[36] And in 1971, in *McKeiver v. Pennsylvania*, the Court noted that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution' within the meaning and reach of the Sixth Amendment" and held that trial by jury in a delinquency proceeding is not constitutionally required.[37]

The significance of the Court's decisions in this area, as assessed by Jonas, is that juveniles charged in delinquency proceedings now have nearly the same due process rights as adults in criminal trials. "Thus, the introduction of procedural protections into juvenile hearings may permit judges to be less protective of the juvenile in the confidentiality area."[38]

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[30] 383 U.S. 541 (1966).
[31] *Id.* at 556.
[32] 387 U.S. 1 (1967).
[33] *Id.* at 18.
[34] In re Winship, 397 U.S. 358 (1970).
[35] Breed v. Jones, 421 U.S. 519 (1975).
[36] 387 U.S. at 25.
[37] 403 U.S. 528, 541 (1971).

In summary, juveniles accused of committing crimes were tried in open hearings until states began creating separate juvenile court systems at the end of the nineteenth century. The practice of private hearings became predominant by the mid-twentieth century, but since then the trend has been towards greater openness. This trend has been fueled in part by the Supreme Court's extension of due process requirements to juvenile court proceedings and in part by the perception of a dramatic increase in juvenile crime.

LITERATURE REVIEW

The literature search for this paper did not uncover any works contending that the public and news media should be excluded without exception from juvenile court proceedings. Instead, most of the writers reviewed here have taken the position that the news media and the public should be allowed to attend juvenile proceedings, but that the media should be prohibited from publishing any information that would identify the juveniles or their families. These works reflect the idea, as expressed in 1960 by a Special Study Commission on Juvenile Justice appointed by the governor of California, that juvenile hearings should be *confidential*, but not *secret.*[39]

One writer who took no position on the issue, Louis A. Day, provided an excellent summary of arguments in favor of confidentiality vs. arguments in favor of access and publicity:

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[38] Jonas, *supra note 12*, at 304.

[39] Cited in Brian W. v. Superior Court, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717, 3 Media L. Rep. (BNA) 1993 (Cal. 1978).

> The arguments in favor of confidentiality are predicated upon a theory of rehabilitation. First of all, the juvenile system is based, in part, on the notion that punishment should be minimized. But publicity concerning a child's antisocial behavior might humiliate him, and this is tantamount to punishment. In addition, adverse publicity might create future disabilities by limiting employment and educational opportunities and impeding successful interpersonal relationships. Some advocates of rehabilitation also argue that publicity amounts to unwarranted exposure and embarrassment for parents and may make reintegration of the child into the family more difficult. There is also some evidence that public recognition actually may be sought by certain delinquents, thereby turning them into "public figures" among their peers. Finally, advocates of confidentiality claim that open juvenile proceedings interfere with informal relationships between judges and juveniles. They believe that open courts would turn the hearing into adversarial proceedings, thus reducing the paternalistic role of the state in juvenile care.
>
> But there are also compelling arguments in favor of access and publicity. First of all, public interest in the juvenile justice system has intensified as a result of the alarming increase in juvenile crime and the trend towards trying some juveniles as adults for serious crimes. Secondly, as in adult trials, the publicizing of the conduct of juvenile hearings would promote the conscientious performance of the judge, counsel and witnesses. It has even been suggested that the slow pace of reform in the juvenile courts is the result of insufficient publicity. In addition, publicity might have a deterrent effect upon the juvenile offender, as well as others who witness the proceeding. Finally, it has been argued that, as procedural protections and other rights for juveniles increase, the line between adult criminals and youth offenders for the purposes of confidentiality becomes blurred. In other words, these protections should carry a *quid pro quo* of public access and inspection to insure that the Supreme Court's recent extension of due process rights to juveniles is as much a matter of substance as legal rhetoric.[40]

Day's article is an assessment of the state of the law in 1984. He concluded that there appeared to be an emerging right of access to juvenile courts in some states because of "liberal statutory interpretations" by courts in those states. Day, a journalism professor at Louisiana State University, also predicted, "[T]he time may be near when the Supreme Court will have to consider the question of access to juvenile proceedings."[41]

One of the most frequently cited works in the literature is a 1958 article by Gilbert Geis.[42] In a passage that sounds as if it could have been written in the 1990s, Geis viewed calls for press access to juvenile hearings as resulting from "what appears to be an unprecedented rise in the rate of juvenile delinquency."[43] He argued that the press should be allowed to attend juvenile proceedings to protect juveniles against judicial abuses, but that the press "should be forbidden by law from disclosing the names of the participants in the hearings." However, Geis also contended that the general public "should never be permitted to attend the hearings."[44]

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[40] Louis A. Day, *Media Access to Juvenile Courts*, 61 Journalism Q. 751, 753 (1984).
[41] *Id.* at 756.
[42] Geis, *supra note 10.*

Another frequently cited work is an unsigned note published in 1967 by *Columbia Law Review*.[45] The article is based on the authors' interviews with juvenile court judges and referees, probation personnel and attorneys, and their observations of juvenile court hearings in 20 cities across the United States. They concluded that authorities were "virtually unanimous" in favoring private hearings, but that there was a "growing tendency" to permit newspaper access to juvenile court.[46] They viewed this development as "a clear betrayal of the juvenile court philosophy" and concluded that "any need for public exposure is, in any event, outweighed by the resultant stigma which handicaps rehabilitative possibilities."[47]

Nearly a decade after Day's article was published, Richard D. Hendrickson also assessed the state of the law.[48] However, unlike Day, Hendrickson – a newspaper editor and a doctoral student in mass communication at the time his article was published – clearly staked out a position on the issue. "It is the author's thesis that the presence of reporters in juvenile courts not only for delinquency cases but also for all other proceedings is vital to the checking function of the media and should be permitted and encouraged by judges."[49] Hendrickson concluded that the press should not count on the courts to provide access but should seek passage of state laws that exempt the media from bans on public access. He also advised that the best way for the media to win access is "through persistent, accurate reporting of the activities of the court and the child-protective systems," and urged, "the media must keep on spreading the gospel of openness for juvenile courts as well as other areas of government."[50]

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[43] *Id.* at 106. Globe Newspaper Co. employed a similar argument in its *Petition for Writ of Certiorari, supra note 27*, at 8: "In this era of rising violent juvenile crime, the role the First Amendment plays in the public's ability to inform itself about the juvenile justice system is an issue of exceptional importance that ought to be decided by this Court."
[44] *Id.* at 125.
[45] Note, *Rights and Rehabilitation in the Juvenile Courts*, 27 Colum. L. Rev. 281 (1967).
[46] *Id.* at 285.
[47] *Id.* at 286.
[48] Richard D. Hendrickson, *Media Access to Juvenile Courts: An Update*, 44 Juv. & Fam. Ct. J. 27 (1993).
[49] *Id.*

Jan L. Trasen provided a more recent example advocating a conditional or qualified form of public and press access to juvenile proceedings as a means to serve the needs of children by focusing public attention on abuses and deficiencies within the juvenile justice system.[51] Trasen wrote in 1995, "A qualified form of public and press access to juvenile trials – which might include the privilege to watch and report, with the condition that no names be disclosed at the proceeding – would be a courageous step toward improving the system."[52] Trasen argued that such qualified public access should be extended not only to juvenile *delinquency* hearings, in which children are accused of being *perpetrators* of crimes, but also to juvenile *dependency* hearings, in which children are thought to be *victims* of abuse or neglect.[53]

At least one article runs counter to the prevailing tide in favor of conditional access. Douglas E. Mirell and David C. Fainer, Jr., argued that conditional access schemes violate the First Amendment because they impose prior restraints on publication of information lawfully obtained from the public domain.[54] This argument is based on their analysis of the Supreme Court's decisions in *Oklahoma Publishing Co. v. District Court* [55] and *Smith v. Daily Mail Publishing Co.*[56]

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[50] *Id.* at 41.

[51] Trasen, *supra note 16.*

[52] *Id.* at 384.

[53] Other articles advocating that the press be allowed to attend and report on juvenile hearings on condition that the juveniles not be identified include John P. Gismondi, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Right of Access,* 39 U. Pitt. L. Rev. 121 (1977); Susan D. Cohen, *Reconciling Media Access with Confidentiality for the Individual in Juvenile Court,* 20 Santa Clara L. Rev. 405 (1980); Andrew R. Kintzinger, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation,* 65 Iowa L. Rev. 1471 (1980); Stephen Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 Colum. J.L. & Soc. Probs. 287 (1982); Note, *The Public Right of Access to Juvenile Delinquency Hearings,* 81 Mich. L. Rev. 1540 (1983); and Susan S. Greenebaum, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?* 44 J. Urb. & Contemp. L. 135 (1993).

[54] Douglas E. Mirell and David C. Fainer, Jr., Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access,"* 13 U.C. Davis L. Rev. 123 (1979).

In *Oklahoma Publishing,* the trial judge allowed reporters to attend the detention hearing of an 11-year-boy charged with murder. After reporters published the juvenile's name, the trial judge enjoined further publication of the juvenile's identity. The Supreme Court reversed the trial judge's injunction on grounds that prohibiting publication of information obtained at court proceedings open to the public violates the First and Fourteenth Amendments. In *Smith,* reporters published the name of a 15-year-old murder suspect, which they learned from witnesses at the scene of the crime. The reporters were later prosecuted for violating a West Virginia statute that prohibited publication of the names of youths charged in juvenile court without written permission from the juvenile court judge. The Supreme Court held that the statute violated the First and Fourteenth Amendments because the state's interest in protecting the anonymity of the juvenile offender was not sufficient to justify a criminal penalty for publication of the juvenile's name.

Mirell and Fainer contended that after *Oklahoma Publishing,* the presence of reporters at a juvenile hearing turns it into a public proceeding and thus precludes prohibitions against publishing the juvenile's name. And after *Smith,* "It would be anomalous indeed for the Court to hold that such a prohibition is unconstitutional outside the juvenile courtroom, but is constitutional at hearings attended by the press."[57]

Finally, some writers argue that youths charged in juvenile court should have the right to a public trial by jury, and that by extension the press and public should have access to juvenile proceedings. These writers are primarily concerned with protecting the rights of juveniles or promoting public confidence in the juvenile justice system, not with gaining access for the media.

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[55] 430 U.S. 308 (1977).

[56] 443 U.S. 97 (1979).

[57] Mirell and Fainer, *supra* n. 53, at 144.

For example, in 1979 New York Family Court Judge Edward J. McLaughlin and his law clerk at the time, Lucia Beadel Whisenand, evaluated three sets of proposed standards for juvenile proceedings and came down in favor of a proposal advanced by the Institute of Judicial Administration and the American Bar Association.[58] The IJA/ABA standards recommended that juveniles have a right to public jury trial, that the press and public be allowed to attend such trials and be free to identify the juvenile in reports about the trial. However, the standards also recommended that juveniles be allowed to waive this right and request partially closed hearings. In such cases, the press could be admitted at the judge's discretion but would be prohibited from publishing the juvenile's name. McLaughlin and Whisenand concluded, "Since neither the public nor the press has an absolute right to attend all stages of all criminal trials, the restrictions suggested [by the IJA/ABA] for juvenile proceedings appear reasonable."[59]

More recently, Massachusetts Trial Court Associate Justice Gordon A. Martin Jr. argued in 1995 that elimination of confidentiality in juvenile proceedings was essential so that the public can see "how diligently and effectively, in general, the players in the [juvenile justice] system function."[60] However, Martin was critical of schemes that require the media to prove that they have a direct interest in the case before the court in order to gain access and that prohibit publication of a juvenile's identity. "How sweeping is a 'direct interest,' and who can possess one? Is it realistic to invite the press into the courtroom, yet not expect them to fully and accurately disclose what goes on?" he asked.[61]

In summary, advocates of private hearings argue that they are essential to promote rehabilitation of juvenile offenders. However, most of the writers reviewed here concluded that the public and the news media have a qualified right of access to juvenile court proceedings.

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[58] Edward J. McLaughlin and Lucia Beadel Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force and NAC Standards*, 46 Brook. L. Rev. 1 (1979).
[59] *Id.* at 37.
[60] Hon. Gordon A. Martin Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 New Eng. J. on Crim. & Civ. Confinement 393 (1995), at 395.
[61] *Id.* at 401.

RESEARCH QUESTIONS

This paper seeks to answer the following research questions:

(1) Is there an emerging right of press and public access to juvenile court proceedings being created by state legislatures, state courts and federal courts?

(2) Is there a constitutional right of access to juvenile court proceedings under *Richmond Newspapers v. Virginia* and its progeny?

METHODOLOGY

To determine the current status of access to juvenile courts, relevant statutes and case law will be examined from each state and from the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Case law involving access under the Federal Juvenile Delinquency Act also will be examined. State and federal case law prior to 1980 will be included when relevant, but priority will be given to cases decided after the Supreme Court's decision in *Richmond Newspapers* established a public right of access to criminal trials of adults. To determine if there is a constitutional right of access to juvenile court, theoretical arguments found in these sources, both for and against press and public access to juvenile court, will be critically analyzed. But in order to place the results of these endeavors in the proper legal context, it is necessary first to discuss the U.S. Supreme Court's doctrine of public access to judicial proceedings.

RICHMOND NEWSPAPERS AND ITS PROGENY

In *Richmond Newspapers*, a Virginia trial judge closed a murder trial to the press and the public at the request of the defendant, on trial for the fourth time after appellate reversal of his conviction in the first trial and two subsequent mistrials. In the closed trial, the judge granted the defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. The Richmond Newspapers company appealed the closure order, which was affirmed by the Virginia Supreme Court. The U.S. Supreme Court reversed the closure order and held that the right to attend criminal trials "is implicit in the guarantees of the First Amendment."[62] Chief Justice Burger's opinion for the majority relied on the long history of trials in the United States being presumptively open, and asserted that "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion" in the wake of a shocking crime.[63] However, he also noted that the right to attend criminal trials was not absolute, and that a trial could be closed if the trial judge found that there was an overriding interest in doing so.[64]

Two years later, the Supreme Court in *Globe Newspaper Co. v. Superior Court* struck down a Massachusetts law requiring the closure of trials during the testimony of juvenile victims of sexual assault.[65] The Court held that a state's interest in safeguarding the physical and psychological well-being of a minor was insufficient to justify a mandatory closure rule, and that trial judges must determine on a case-by-case basis whether closure is necessary to protect a minor victim.

After another two years, the Court concluded, in the first of two California cases involving the ***Press-Enterprise*** newspaper and Riverside County Superior Court, that jury selection is an integral part of a trial and therefore was subject to a presumption of public access.[66] More significantly, the Court in ***Press-Enterprise I*** established a test for determining when a proceeding can be closed without violating the First Amendment. Under the test, a proceeding cannot be closed unless (1) there is an overriding interest that would be prejudiced by an open proceeding, (2) the closure is no broader than necessary to protect that interest, (3) reasonable alternatives to closure have been considered, and (4) the trial court made findings adequate to support closure.[67]

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[62] 448 U.S. at 580.
[63] *Id.* at 571.
[64] *Id.* at 581 n. 18.
[65] 457 U.S. 596 (1982).
[66] Press-Enterprise Co. v. Superior Court ("Press-Enterprise I"), 464 U.S. 501 (1984).

In the second case, commonly referred to as *Press-Enterprise II,* the Court extended the qualified right of access to preliminary hearings in criminal cases.[68] To determine whether a right of access attached to that type of proceeding, the Court considered whether (1) there was a history or tradition of public access to the type of hearing in question, and (2) openness served a positive function such as enhancing the appearance of fairness or public confidence in the judicial system.[69] The Court concluded that the answers to these questions indicated that there was a presumption of access to preliminary hearings and that the presumption "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[70] Finally, the Court held that if the defendant's right to a fair trial is the interest to be served, a proceeding may be closed only if the trial judge finds that (1) that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity, and (2) there are no reasonable alternatives to closure that would adequately protect that right.[71]

STATE JUVENILE COURT STATUTES

The author obtained copies of and reviewed the latest available versions of statutes dealing with access to juvenile courts from 48 states and from the District of Columbia, Puerto Rico, and the Virgin Islands. It was determined that two states, Nebraska and Oregon, have no such statutes. Hearings are presumptively closed under the statutes in 19 jurisdictions, but juvenile court judges have the authority to permit press and public attendance in all but one of these jurisdictions – New Hampshire.[72] These jurisdictions are listed in Table 1.

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[67] *Id.* at 510. *See also* T. Barton Carter et al., Mass Communication Law In a Nutshell 254 (4th ed. 1994).
[68] Press-Enterprise Co. v. Superior Court ("Press-Enterprise II"), 478 U.S. 1 (1986).
[69] *Id.* at 9.
[70] *Id.* at 9-10 (citing *Press-Enterprise I*).
[71] *Id.* at 14. *See also* Carter et al., *supra* note 67, at 255.

TABLE 1

Public presumptively excluded, but judge has discretion to allow access

1. Alabama[73]
2. Alaska[74]
3. Connecticut[75]
4. District of Columbia[76]
5. Hawaii [77]
6. Idaho[78]
7. Illinois[79]
8. Kentucky[80]
9. Mississippi[81]
10. New Jersey[82]
11. Oklahoma[83]
12. Pennsylvania[84]
13. Rhode Island[85]
14. South Carolina[86]
15. South Dakota[87]
16. Vermont[88]
17. Washington[89]
18. Wyoming[90]

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[72] N.H. Rev. Stat. Ann. § 169-B:34 (1994). (This statute *does not* give the judge discretion to admit the press or public).

[73] Ala. Code § 12-15-65 (1995).

[74] Alaska Stat. § 47.10.070(a) (1995).

[75] Conn. Gen. State. Ann. § 46b-122 (West 1995).

[76] D.C. Code. Ann. § 16-2316(e) (1989).

[77] Haw. Rev. Stat. § 571-41(b) (1985).

[78] Idaho Juv. R. 22(b) (1995).

[79] Ill. Ann. Stat. ch. 705, para. 405/1-5(6) (Smith-Hurd 1992).

[80] Ky. Rev. Stat. Ann. § 610.070(3) (Michie/Bobbs-Merrill Supp. 1994).

[81] Miss. Code. Ann. § 43-21-203(6) (1993).

[82] N.J. Stat. Ann. § 2A:4A-60(4)(i) (West Supp. 1995).

[83] Okla. Stat. Ann. tit. 10, § 7003-4.1(1) (West. Supp. 1996).

[84] Pa. Stat. Ann. tit. 42, § 6336(d) (1982 & Supp. 1995).

[85] R.I. Gen. Laws. § 14-1-30 (1994).

[86] S.C. Code Ann. § 20-7-755 (Law. Co-op. Supp. 1995).

[87] S.D. Codified Laws Ann. § 26-7A-36 (1992).

[88] Vt. Stat. Ann. tit. 33, § 5523(c) (1991).

[89] Wash. Rev. Code Ann. § 13.34.110 (West Supp. 1996).

[90] Wyo. Stat. § 14-6-224(b) (Supp. 1995).

Hearings are presumed closed unless the juvenile requests a public hearing in three jurisdictions. These jurisdictions are listed in Table 2.

TABLE 2

Hearings presumed closed unless juvenile requests public hearing:

1. Puerto Rico[91]
2. Virginia[92]
3. Wisconsin[93]

The statutes of seven jurisdictions state that hearings "may be closed" or that the public "may be excluded" at the judge's discretion. These states are listed in Table 3.

TABLE 3

Hearings "may be closed" or public "may be excluded" at judge's discretion:

1. Arkansas[94]
2. Iowa[95]
3. Maryland[96]
4. New York[97]
5. North Carolina[98]
6. Ohio[99]
7. Tennessee[100]

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[91] P.R. Laws Ann. tit. 34, § 2208 (1990).

[92] Va. Code. Ann. § 16.1-302 (1995). (The juvenile has a right to a public hearing, unless the juvenile expressly waives that right, in cases alleging criminal or traffic offenses).

[93] Wis. Stat. Ann. § 48.299(1)(a) (West Supp. 1995). (The judge cannot open hearings if the victim of an alleged sexual assault objects, or if a parent or guardian objects).

[94] Ark. Code. Ann. § 9-27-325(i) (Michie Supp. 1995). However, the same section states that "in delinquency cases the juvenile shall have the right to an open hearing."

[95] Iowa Code Ann. § 232.39 (West 1994). However, a judge may still admit persons with a "direct interest in the case or in the work of the court" after closing a hearing.

[96] Md. R. Juv. Ct. 910(b).

[97] N.Y. Fam. Ct. Act § 341.1 (McKinney 1983 & Supp. 1996).

[98] N.C. Gen. Stat. §§ 7A-629 & 7A-640 (1995). (Hearings must be open if the juvenile requests it).

[99] Ohio Rev. Code. Ann. § 2151.35(A) (Anderson 1994). The Ohio Supreme Court has declared that juvenile court proceedings are neither presumptively open nor presumptively closed to the public. *In re T.R.*, 56 Ohio St. 3d, 556 N.E.2d 439, 17 Media L. Rep. 2241, 2249 (1990).

[100] Tenn. Code Ann. § 37-1-124(d) (1991).

Hearings are presumptively open to the public in seven states. These states are listed in Table 4.

TABLE 4

Hearings presumptively open to the public:

1. Colorado[101]
2. Florida[102]
3. Michigan[103]
4. Montana[104]
5. Nevada[105]
6. New Mexico[106]
7. Texas[107]

The statutes in 13 jurisdictions provide for open hearings when a juvenile is charged with designated serious or violent offenses, while all other juvenile hearings are presumptively closed. These jurisdictions are listed in Table 5.

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[101] Colo. Rev. Stat. § 19-1-106 (1995).
[102] Fla. Stat. Ann. § 39.052(c) (West Supp. 1996).
[103] Mich. Stat. Ann. § 27.3178(598.17.7) (Supp. 1995). (Hearings may be closed when necessary to protect welfare of child witness or victim).
[104] Mich. Stat. Ann. § 27.3178(598.17.7) (Supp. 1995). (Hearings may be closed when necessary to protect welfare of child witness or victim).
[105] Nev. Rev. Stat. Ann. § 62.193(1) (1995).
[106] N.M. Stat. Ann. § 32A-2-16(B) (Michie 1995).
[107] Tex. (Fam.) Code Ann. §54.08(a) (West Supp. 1996).

TABLE 5

Hearings open to the public when juvenile is charged with designated serious or violent offenses:

1. Arizona[108]
2. California[109].
3. Delaware [110]
4. Georgia[111]
5. Indiana[112].
6. Louisiana[113]
7. Maine[114]
8. Massachusetts[115]
9. Minnesota[116]
10. Missouri[117]
11. North Dakota[118]
12. Utah[119]
13. Virgin Islands[120]

In one state, Kansas, all *adjudicatory* hearings are open to the public when the juvenile is 16 or older.[121] However, the Kansas Supreme Court has held that this statute does not apply to detention hearings and other pre-trial hearings in juvenile cases.[122] Thus, all hearings prior to the adjudicatory hearing are closed to the public.

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[108] Ariz. Juv. Ct. R.P. 7(c) (1996).
[109] Cal. Welf. & Inst. Code § 676(a) (West Supp. 1996).
[110] Del. Code Ann. tit. 10 § 1063(a) (Supp. 1994).
[111] Ga. Code. Ann. § 15-11-28(c.1) (Supp. 1995).
[112] Indiana Code Ann. § 31-6-7-12(c) (Burns Supp. 1995).
[113] La. Ch. C. art. 407(A) and art. 879(C) (1995). (The Louisiana Children's Code replaced the Louisiana Code of Juvenile Procedure).
[114] Me. Rev. Stat. Ann. tit. 15, § 3307(2) (West Supp. 1995).
[115] Mass. Ann. Laws ch. 119, § 65 (Law. Co-op. 1994).
[116] Minn. Stat. Ann. § 260.155 (West 1992 & Supp. 1996). (The juvenile must be 16 or older for hearings to be opened under this statute).
[117] Mo. Ann. Stat. § 211.171(5) (Vernon Supp. 1996).
[118] N.D. Cent. Code § 27-20-34 (Supp. 1995).
[119] Utah Code Ann. § 78-3a-33 (1992 & Supp. 1995). (The juvenile must be 16 or older for hearings to be opened under this statute).
[120] V.I. Code Ann. tit 5, § 2508 (1994). (Cases involving juveniles 14 or older charged with an offense that would be a felony if committed by an adult are tried in adult court).
[121] Kan. Stat. Ann. § 38-1652(a) (Supp. 1995).
[122] Stauffer Communications, Inc. v. Mitchell, 246 Kan. 492, 789 P.2d 1153, 17 Media L. Rep. (BNA) 1739 (Kan. 1990).

Fourteen jurisdictions have amended their juvenile court statutes during the past decade to provide for greater public access. These jurisdictions, and descriptions of the changes they made, are listed in chronological order in Table 6.

TABLE 6

States that have provided greater access in the past decade:

1. Minnesota (A 1986 amendment opened hearings in which the juvenile is at least 16 years old and is charged with an offense that would be a felony if committed by an adult).[123]

2. Michigan (A 1988 law made juvenile hearings presumptively open).[124]

3. California (A 1990 amendment opened hearings for juveniles under 16 charged with violent offenses;[125] a 1993 amendment opened hearings in carjacking cases;[126] and a 1994 amendment opened hearings in driveby shooting, kidnapping, torture, and aggravated mayhem cases[127]).

4. Massachusetts (A 1990 amendment opened hearings when the child is charged with murder in the first or second degree).[128]

5. Utah (A 1993 amendment opened hearings in cases where a juvenile 16 or older is charged with an offense that would be a felony if committed by an adult).[129]

6. Virgin Islands (A 1994 amendment lowered the age at which juveniles could be tried in adult court for felony offenses from 16 to 14).[130]

7. Arizona (On Oct. 25, 1994, the Arizona Supreme Court amended its Rules of Procedure for the Juvenile Court for a two-year experiment in which all hearings involving felony charges would be open to the public unless the juvenile court issues written findings that closed hearings are necessary to protect the best interests of the juvenile. The experiment will last from Jan. 1, 1995 until Dec. 31, 1996, or until further extended by order of the Arizona Supreme Court).[131]

8. Georgia (A 1995 amendment opened hearings in cases involving a designated felony).[132]

9. Indiana (A 1995 amendment opened hearings in cases alleging that a child has committed an act that would be murder or a felony if committed by an adult).[133]

10. Louisiana (A 1995 amendment opened hearings in cases involving a crime of violence).[134]

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[123] 1986 Minn. Laws c. 361, § 1.
[124] 1988 Mich. Pub. Acts No. 224. *See also* Neal, *supra note 7*.
[125] 1990 Cal. Stat. c. 246 (A.B.2638), § 2.
[126] 1993 Cal. Stat. c. 610 (A.B.6), § 29; 1993 Cal. Stat. c. 611 (S.B.60), § 33.
[127] 1994 Cal. Stat. c. 453 (A.B.560), § 8.
[128] 1990 Mass. Acts 267, § 4.
[129] 1993 Utah Laws (2nd S.S.), ch. 11, § 1.
[130] 1994 V.I. Sess. Laws (page numbers not available). May 2, 1994, No. 5973, § 3(a)-(d).
[131] Ariz. Juv. Ct. R.P. 7(c) (see "Court Comment to 1994 Amendment"), and Ariz. Juv. Ct. R.P. 19. *See also* Martin, *supra note 60*, at 405.
[132] 1995 Ga. Laws p. 619, § 1.
[133] 1995 Ind. Acts, P.L.268-1995, § 10 (effective July 1, 1995).
[134] 1995 La. ALS 1313, 1995 La. ACT 1313, 1995 La. SB 1412.

11. Missouri (A 1995 amendment opened hearings in cases where the child is charged with an offense that would be a felony if committed by an adult).[135]

12. Nevada (A 1995 amendment added language requiring that all hearings must be open to the general public unless the judge or referee finds that closing all or part of the proceedings is in the best interests of the child or the general public).[136]

13. North Dakota (A 1995 amendment to North Dakota's Uniform Juvenile Court Act provides that cases involving youths 14 or older charged with murder, attempted murder, gross sexual imposition or attempted gross sexual imposition by force or by threat of death, serious bodily injury or kidnapping, will be tried in adult court, and repeals the old law which closed hearings where juveniles were tried as adults).[137]

14. Texas (A 1995 amendment provides that hearings shall be presumptively open).[138]

Table 6 demonstrates the most significant findings of the statute search. In 1995 alone, seven states amended their juvenile laws. The 1995 amendments in five of those seven states – Georgia, Indiana, Louisiana, Missouri, and North Dakota – opened hearings to the public in cases involving serious or violent offenses, defined as offenses that would be felonies if committed by adults. The 1995 amendments in the other two states – Nevada and Texas – provided that *all* juvenile hearings would be presumptively open. Of the fourteen states that provided greater access during the past decade, eleven did so based on the seriousness of the alleged offense. These findings demonstrate a clear trend among state legislatures to provide greater access in cases involving violent offenses. They also support the following conclusion reported by *The News Media & The Law* in the fall of 1995: "The recent focus on violent crimes committed by juveniles has caused a shift from goals of rehabilitation to those of retribution and deterrence. As a consequence, many states have opened juvenile proceedings to the public, especially when a minor is charged with a violent crime that incites community outrage."[139]

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[135] 1995 Mo. Laws. , H.B. Nos. 174,325 & 326, § A.

[136] 1995 Nev. Stat. ch. 444, § 7 (effective July 1, 1995).

[137] 1995 N.D. Laws ch. 124, § 15 (codified at N.D. Cent. Code § 27-20-34 (Supp. 1995).

[138] 1995 Tex. Gen. Laws ch. 262, § 45 (effective Jan. 1, 1996).

[139] The Reporters Committee for Freedom of the Press, *Access to Juvenile Courts: A Reporter's Guide to Proceedings & Documents*, at 2 (a supplement found in The News Media & The Law, Fall 1995, between pages 24 and 25).

A few of the statutes deserve further discussion. The Illinois statute, for example, states, "The general public *except for the news media* and the victim shall be excluded from any hearing ... ."[140] This would appear to mean that the press has an unconditional right of access under this statute. However, the Illinois Appellate Court has held that the news media are not excepted from the class of persons whom a court may exclude and that the press has only a conditional right of access under this statute.[141]

Similarly, the wording of the New York statute appears to at least permit public access. It states, "The general public *may be* excluded from any proceedings under this article ... ."[142] In fact, a 1989 article in *The News Media & The Law* listed the statute as one under which juvenile hearings were "presumptively open to the public."[143] However, a practice commentary published with the statute reports that although the wording of this section appears to permit public access, "In practice, the opposite applies – the public is routinely excluded from all family court proceedings ... ." However, the commentary also notes that Rule 2501.2 of the Family Court Act Rules gives judges discretion to admit reporters on condition that the juvenile not be identified.[144] Furthermore, a 1978 law provides that 13-,14- and 15-year-olds will be tried as adults when charged with murder or armed felony,[145] and a 1979 law extended the 1978 law to require open hearings in all felony cases.[146]

Finally, although Table 6 demonstrates a clear trend among state legislatures of providing greater access to juvenile court, there is one notable exception: South Dakota. Prior to 1991, juvenile hearings in South Dakota were open to the public unless the juvenile requested a closed hearing,[147] and trial judges were required to balance the juvenile's interest in confidentiality against the media's First Amendment rights before a hearing could be closed.[148] But in 1989, three juveniles were accused of raping a 16-year-old girl at the South Dakota governor's residence. The incident was reported widely in the Washington, D.C., *Times,* the Orlando, Florida, *Sentinel, Newsweek* magazine, *U.S.A. Today,* and on the nationally televised program "A Current Affair," which "suggested that a crime had been committed at the Governor's residence and that officials of the state of South Dakota are trying to cover up this alleged fact."[149] The juvenile court judge closed the proceeding as a result of the intensive publicity, and the South Dakota Supreme Court upheld the closure.[150] Nonetheless, in 1991 the South Dakota legislature enacted a new law providing that all juvenile hearings are closed "unless the court finds compelling reasons to require otherwise." As the South Dakota Supreme Court noted in 1995, the balancing test it had required from 1987 to 1991 "no longer applies as the legislature has abrogated the presumption of open juvenile hearings."[151]

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[140] Ill. Ann. Stat. ch. 705, para. 405/1-5(6) (Smith-Hurd 1992) (emphasis added).
[141] In re a minor, 150 Ill. Dec. 942, 205 Ill. App.3d 480, 563 N.E.2d 1060 (Ill. App. 4 Dist. 1990).
[142] N.Y. Fam. Ct. Act § 341.1 (McKinney 1983 & Supp. 1996) (emphasis added).
[143] *Prior Restraints & Secret Courts*, The News Media & The Law, Spring 1989, at 21.
[144] Merril Sobie, *Practice Commentary* on N.Y. Fam. Ct. Act § 341.1 (McKinney 1983, at 445).
[145] 1978 N.Y. Laws ch. 481.
[146] 1979 N.Y. Laws ch. 411, § 15.
[147] *See* In re M.C., 527 N.W.2d 290, 23 Media L. Rep. 1461 (S.D. 1995).

To summarize the results of the statute search, hearings are presumptively closed in nineteen jurisdictions, but juvenile court judges have the authority to admit the press and the public in all but one of those jurisdictions. Hearings are presumed closed unless the juvenile requests a public hearing in three jurisdictions, and hearings may be closed at the judge's discretion in seven jurisdictions.

In contrast, hearings are presumptively open to the public in seven jurisdictions. Thirteen jurisdictions require open hearings when a juvenile is charged with a serious or violent offense, and one state requires that adjudicatory hearings be open if the juvenile is 16 or older. Two states have no statutes dealing with access to juvenile courts, and fourteen jurisdictions have amended their laws during the past decade to provide greater public access.

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[148] *See* Associated Press v. Bradshaw, 410 N.W.2d 577, 14 Media L. Rep. 1566 (S.D. 1987).

[149] In re Hughes County, 452 N.W.2d 128, 17 Media L. Rep. 1513, 1515 (S.D. 1990).

[150] However, because the wording of the closure order did not limit its duration, the South Dakota Supreme Court later reversed it in Sioux Falls Argus-Leader v. Young, 435 N.W.2d 864, 18 Media L. Rep. (BNA) 1045 (S.D. 1990). But reversal came months after the ajudicatory hearing at issue had been completed, and thus the public and the media never gained access to the proceeding.

[151] In re M.C., 23 Media L. Rep. at 1463.

STATE CASE LAW

The author attempted to obtain copies of all published state court decisions involving press or public access to juvenile courts reported since the U.S. Supreme Court's 1980 decision in *Richmond Newspapers v. Virginia.* Sources searched include *Media Law Reporter,* the Lexis electronic database, West's regional digests for each region of the United States, and *The News Media & The Law.* Decisions from state courts of last resort were given priority, but some intermediate appellate court and trial court decisions were included as well, especially when those decisions were the only ones available from a particular state. Some decisions from the late 1970s also were included because the frequency with which they were cited in the literature and in later cases indicated that they were among the most significant state court decisions in this area. This search produced thirty-three decisions that favored press or public access to juvenile court hearings and fifteen decisions in which state courts denied press or public access. In addition, the search produced a handful of decisions that do not fit comfortably into either of these broad categories but are significant for other reasons.

These findings suggest that there may be a trend towards greater public access being created by state courts, but the initial numbers may be misleading. Some of the decisions granting access have since been reversed, and some are only trial court decisions. Many of these decisions do nothing more than grant access in a particular case and do not establish an unconditional or even a qualified right of access to juvenile cases in general. Some of the cases *favoring* access did not actually grant access; these are explained in footnotes. And, in any event, the significance of these decisions cannot be fully assessed without also taking into account the *reasons* that courts have used to grant or deny access.

The decisions favoring access are listed in Table 7, while the decisions favoring closure are listed in Table 8.

TABLE 7
DECISIONS FAVORING ACCESS

Open hearings serve public interest:

1. Arizona (*Wideman v. Garbarino*, 1989).[152]
2. Florida (*In re B.P.*, 1983).[153]
3. Indiana (*Taylor v. Indiana*, 1982).[154]
4. New York (*New York v. Gregory M.*, 1994).[155]

Legislature intended to allow press and/or public access:

1. California (*Brian W. v. Superior Court*, 1978).[156]
2. Massachusetts (*News Group Boston, Inc. v. Massachusetts*, 1991).[157]

Press has "legitimate interest" in work of the court:

1. California (*San Bernardino County v. San Bernardino County Superior Court*, 1991).[158]
2. Minnesota (*Welfare of R.L.K.*, 1978).[159]
3. Wisconsin (*State ex. rel. E.R. v. Flynn*, 1979).[160]

State constitution requires open hearing or creates presumption of open hearings:

1. Oregon (*Oregonian Publishing v. Deiz*, 1980).[161]
2. South Carolina (*Ex parte Columbia Newspapers, Inc.*, 1985).[162]
3. South Carolina (*Ex parte The Island Packet*, 1992).[163]

Closure statute does not apply to appellate proceedings:

1. Washington (*In re J.B.S.*, 1993).[164]

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[152] 160 Ariz. 16, 770 P.2d 320, 16 Media L. Rep. (BNA) 1253 (Ariz. 1989).

[153] 9 Media L. Rep. (BNA) 1151 (Fla. Cir. Ct. 4 1983).

[154] 438 N.E.2d 275, 8 Media L. Rep. (BNA) 2287 (Ind. 1982).

[155] 22 Media L. Rep. (BNA) 2252 (N.Y. Fam. Ct.-Kings County 1994).

[156] 20 Ca.3d 618, 574 P.2d 788, 143 Cal. Rptr. 717, 3 Media L. Rep. (BNA) 1993 (Cal. 1978).

[157] 409 Mass. 627, 568 N.E.2d 600, 18 Media L. Rep. (BNA) 2102 (Mass. 1991).

[158] 232 Cal.App.3d 188, 283 Cal. Rptr. 332, 19 Media L. Rep. (BNA) 1545 (Cal. Ct. App. 4 Dist. 1991) (a dependency case).

[159] 269 N.W.2d 367, 4 Media L. Rep. (BNA) 1539 (Minn. 1978).

[160] 88 Wis.2d 37, 276 N.W.2d 313 (Wis. App. 1979).

[161] 289 Ore. 277, 613 P.2d 23, 6 Media L. Rep. (BNA) 1369 (Or. 1980).

[162] 286 S.C. 116, 333 S.E.2d 337 (S.C. 1985) (This decision was reached after the case already been tried in closed hearings).

[163] 308 S.C. 198, 417 S.E.2d 575, 20 Media L. Rep. (BNA) 1166 (S.C. 1992).

[164] 122 Wash.2d 131, 856 P.2d 694, 21 Media L. Rep. (BNA) 2048 (Wash. 1993) (a dependency case).

Statute allows public or press access or creates qualified right of public access:

1. California (*Cheyenne K. v. Tuolomne County Superior Court*, 1989).[165]
2. Minnesota (*Minneapolis Star Tribune v. Bush*, 1993).[166]
3. New Jersey (*In re P.P.*, 1995).[167]
4. New York (*Capital Newspapers v. Moynihan*, 1988).[168]
5. New York (*Orange County Publications v. Dallow*, 1987).[169]
6. New York (*The Herald Co. v. Tormey*, 1989).[170]
7. Ohio (*Ohio ex. rel. Fyffe v. Pierce*, 1988).[171]
8. Ohio (*In re three unnamed juveniles*, 1988).[172]
9. Texas (*R.A.G. v. State*, 1993).[173]
10. South Dakota (*Associated Press v. Bradshaw*, 1987) (Later limited by the state legislature).[174]

First Amendment creates qualified right of public access:

1. Georgia (*Florida Publishing Co. v. Morgan*, 1984).[175]
2. Georgia (*In re Thomas*, 1988).[176]
3. Georgia (*In re Ross*, 1989).[177]
4. New York (*New York v. Green*, 1978).[178]
5. New York (*In re Chase*, 1982).[179]
6. Ohio (*In re Roberts*, 1986).[180]

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[165] 208 Cal.App.3d 331, 256 Cal. Rptr. 68, 16 Media L. Rep. (BNA) 1411 (Cal. Ct. App. 5 Dist. 1989).

[166] 20 Media L. Rep. (BNA) 2293 (Minn. Ct. App. 1993).

[167] 23 Media L. Rep. (BNA) 2178 (N.J. Super. Ct. 1995).

[168] 71 N.Y.2d 263, 519 N.E.2d 825, 525 N.Y.S.2d 24, 14 Media L. Rep. (BNA) 2262 (N.Y. 1988) (sentencing proceedings in felony cases in which defendant has been granted youthful offender status are presumptively open to press and public).

[169] 14 Media L. Rep. (BNA) 1311 (N.Y. Sup. Ct.–Orange Co. 1987).

[170] 142 Misc.2d 675, 537 N.Y.S.2d 978, 16 Media L. Rep. (BNA) 1702.

[171] 40 Ohio St. 3d 8, 531 N.E.2d 673, 15 Media L. Rep. (BNA) 2431 (Ohio 1988).

[172] 14 Media L. Rep. (BNA) 2312 (Oh. Common Pleas Ct.– Warren County 1988) (news media granted access to juvenile court proceedings to determine whether probable cause exists to believe that juvenile committed murder and that such act would be a felony if committed by an adult).

[173] 870 S.W.2d 79 (Tex.App.–Dallas 1993).

[174] 410 N.W.2d 577, 14 Media L. Rep. (BNA) 1566 (S.D. 1987).

[175] 253 Ga. 467, 322 S.E.2d 233, 11 Media L. Rep. (BNA) (Ga. 1984) (it's unclear from this decision whether the proceedings were opened).

[176] 15 Media L. Rep. (BNA) 2157 (Ga. Juv. Ct.–Fulton Co. 1988) (adjudicatory hearing opened to the press; dispositional hearing remained closed).

[177] 16 Media L. Rep. (BNA) 2087 (Georgia Juv. Ct.–DeKalb Co. 1989) (interest in closed hearing by juveniles charged with felonies outweighed by interest of public and press in an open hearing).

[178] 4 Media L. Rep. (BNA) 1561 (N.Y. Sup. Ct.–New York County 1978).

[179] 112 Misc.2d 436, 446 N.Y.S.2d 100, 8 Media L. Rep. (BNA) 1496 (N.Y.C. Fam. Ct.–New York County 1982).

[180] 13 Media L. Rep. (BNA) 1427 (Ohio Ct. Common Pleas–Coshocton County 1986).

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First Amendment creates qualified right of public access (continued):

7. Ohio (*Ohio ex rel Dispatch Printing Co. v. Petree*, 1988).[181]

8. Tennessee (*Tennessee v. James*, 1995).[182]

9. Vermont (*In re Juvenile Delinquency Proceedings*, 1981) (Later reversed).[183]

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[181] 15 Media L. Rep. (BNA) 2200 (Ohio Ct. App. 1988) (It remains unclear whether the trial court, on remand, opened the proceeding.).

[182] 905 S.W.2d 911, 23 Media L. Rep. (BNA) 2560 (Tenn. 1995) (It remains unclear whether the trial court, on remand, opened the proceeding).

[183] 7 Media L. Rep. (BNA) 1740, 1743 (Vt. Dist. Ct., Chittenden Circ., 1981).

TABLE 8
DECISIONS FAVORING CLOSURE

Interest in confidentiality outweighs interest in access:

1. District of Columbia (*In re J.D.C., 1991*).[184]

3. Kentucky (*F.T.P. v. Courier-Journal,* 1989).[185]

4. New Jersey (*State in the interest of D.B.,* 1981;[186] and *State in interest of B.J.W.,* 1991).[187]

5. New York (*In re Robert M.,* 1981;[188] and *In re Katherine B.,* 1993).[189]

6. South Dakota (*In re Hughes County,* 1990;[190] and *In re M.C.,* 1995).[191]

Statute opens adjudicatory hearings only:

1. Kansas (*Stauffer Communications, Inc. v. Mitchell,* 1990).[192]

Media access would threaten right to fair trial:

1. New York (*In re Merola,* 1979) (two separate decisions).[193]

First Amendment right of access does not apply to juvenile proceedings:

1. Ohio (*In re T.R.,* 1990).[194]

2. Rhode Island (*Sherman Publishing v. Goldberg,* 1982).[195]

3. Utah (*In the matter of N.H.B.,* 1989). [196]

4. Vermont (*In re J.S.,* 1981).[197]

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[184] 594 A.2d 70, 19 Media L. Rep. (BNA) 1041 (D.C. 1991).

[185] 774 S.W.2d 444, 16 Media L. Rep. (BNA) 1921 (Ky. 1989).

[186] 181 N.J. Super. 586, 439 A.2d 94, 7 Media L. Rep. (BNA) 2345 (N.J. Juv. & Dom.Rel.Ct. 1981).

[187] 250 N.J. Super. 619, 595 A.2d 1132 (N.J.Super.Ch. 1991).

[188] 109 Misc.2d 427, 439 N.Y.S.2d 986 (N.Y.C. Fam. Ct. 1981).

[189] 189 A.D.2d 443, 596 N.Y.2d 847, 21 Media L. Rep. (BNA) 1664 (N.Y. App. Div. 2 Dept. 1993) (involved a child protective proceeding).

[190] 542 N.W.2d 128, 17 Media L. Rep. (BNA) 1513 (S.D. 1990).

[191] 527 N.W.2d 290, 23 Media L. Rep. (BNA) 1461 (S.D. 1995).

[192] 246 Kan. 492, 789 P.2d 1153, 17 Media L. Rep. (BNA) 1739 (Kan. 1990).

[193] 47 N.Y. 2d 985, 393 N.E.2d 1038, 419 N.Y.S.2d 965, 5 Media L. Rep. (BNA) 1371 (N.Y. 1979); and 68 A.D.2d 24, 415 N.Y.S.2d 992, 5 Media L. Rep. (BNA) 1033 (N.Y. App. Div. 1 Dept.) (involved a 13-year-old charged with murder and being tried as an adult).

[194] 52 Ohio St. 3d 6, 556 N.E.2d 439, 17 Media L. Rep. (BNA) 2241 (Ohio 1990), *cert. denied,* Dispatch Printing Co. v. Solove, 498 U.S. 598, 111 S.Ct. 386, 112 L.Ed.2d 396 (1990) (involved hearings in child custody dispute).

[195] 443 A.2d 1252, 8 Media L. Rep. (BNA) 1489 (R.I. 1982).

[196] 769 P.2d 844 (Utah App. 1989) (also held that interest in confidentiality outweighed media's right of access).

[197] 140 Vt. 458, 438 A.2d 1125, 7 Media L. Rep. (BNA) 2402 (Vt. 1981) (also held that the interest in confidentiality outweighed the interest in public or press access).

A FIRST AMENDMENT RIGHT OF ACCESS?

The most significant of the reasons listed for granting or denying access is that the First Amendment does or does not create a right of access to juvenile court proceedings. Nine decisions held that the First Amendment does apply to juvenile proceedings, while four decisions came to the opposite conclusion. However, only two of the decisions finding a First Amendment right of access can be considered to be what attorneys call "good law." Six of the nine decisions are trial court opinions[198] and one of those six – *In re Juvenile Delinquency Proceedings* – was later reversed by the Vermont Supreme Court.

The first of the two decisions that is still "good law" was the Georgia Supreme Court's ruling in *Florida Publishing Co. v. Morgan.* In 1984, that court concluded that Georgia's juvenile court access statute, under which hearings are presumptively closed, did not violate the First Amendment.[199] However, the Court also concluded that for constitutional reasons the presumption of closed hearings could not be absolute, and held, "[W]here a member of the public or press institutes a judicial proceeding to require the opening of a juvenile hearing, the court must in an expeditious manner give the public or press an opportunity to present evidence and argument to show that the state's or juveniles' interest in a closed hearing is overridden by the public's interest in a public hearing. The juvenile court's ruling on this question must be composed of 'findings in writing articulate enough for appellate review.' "[200] Two Georgia juvenile courts later cited *Florida Publishing* to grant petitions by newspapers seeking access to juvenile court proceedings.[201]

The second decision that is still "good law" was the Tennessee Supreme Court's 1995 opinion in *Tennessee v. James.* That court concluded that the public has a qualified First Amendment right of access to transfer hearings – hearings to determine whether juveniles will be transferred from juvenile court for an open trial in adult court.[202] The Tennessee court also held that juvenile court judges must apply a five-part balancing test before a transfer hearing can be closed.[203] The Tennessee test is similar to the tests set forth in *Associated Press v. Bradshaw* and the *Press-Enterprise* cases.

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[198] The six are *In re Thomas, In re Ross, New York v. Green, In re Chase, In re Roberts,* and *In re Juvenile Delinquency Proceedings.*

[199] 253 Ga. 467, 322 S.E.2d 233, 11 Media L. Rep. (BNA) 1021 (Ga. 1984).

[200] 11 Media L. Rep. (BNA) at 1025 (citing *Richmond Newspapers* and *Press-Enterprise I*).

[201] *In re Thomas, supra note 176,* and *In re Ross, supra note 177.*

In later proceedings in the same case, the Tennessee Court of Appeals concluded that the media have no greater right of access to judicial proceedings than has the public.[204] However, the court added: "The existence and scope of the right does not depend on the media's motives or on its ethical responsibility. The most serious journalist enjoys no greater rights or privileges than the representative of the most tawdry tabloid. Thus, access issues must be decided without any consideration of the media's motives or of its anticipated use of the information."[205]

In contrast, the highest courts in three states (Ohio, Rhode Island, and Vermont) and the intermediate appellate court in one state (Utah) have held that the First Amendment right of access to criminal proceedings does not apply to juvenile proceedings. The first of the four latter states to deal with the issue was Vermont. In July 1981, a Vermont trial judge observed that a juvenile delinquency proceeding "carries with it nearly all of the attributes of an adult criminal trial."[206] The trial judge concluded that under *Richmond Newspapers,* "[A] juvenile delinquency proceeding is a criminal prosecution for the purposes of the First Amendment."[207] Thus, the trial judge held that the First Amendment rights of the newspaper seeking access to the juvenile delinquency proceeding outweighed the state's interest in preserving confidentiality.[208]

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[202] Tennessee v. James, *supra note 182*, 905 S.W.2d 911, 23 Media L. Rep. (BNA) 2560.

[203] 23 Media L. Rep. (BNA) at 2562.

[204] Tennessee v. James, 1995 Tenn. App. LEXIS 533, 23 Media L. Rep. (BNA) 2537 (Tenn. Ct. App. 1995).

[205] 23 Media L. Rep. (BNA) at 2540.

[206] In re Juvenile Delinquency Proceedings, 7 Media L. Rep. (BNA) 1740, 1743 (Vt. Dist. Ct, Chittenden Circ., 1981).

[207] *Id.* at 1744.

[208] *Id.* at 1745.

The Vermont Supreme Court reversed the trial judge's decision five months later.[209] That court concluded that *Richmond Newspapers* did not apply to juvenile proceedings because such proceedings have no tradition of openness, are not criminal trials, and because "compelling interests in confidentiality" override First Amendment interests in access. "Thus it appears to us that a juvenile prosecution is so unlike a criminal prosecution that the limited right of access described in *Richmond Newspapers* does not govern," the court concluded.[210] Courts in Rhode Island, Utah and Ohio later used this decision as persuasive authority in their own opinions, concluding that the First Amendment right of access under *Richmond Newspapers* does not apply to juvenile proceedings.[211]

In 1988, the Ohio Court of Appeals held that juvenile court judges must adhere to the guidelines set forth in *Richmond Newspapers* and *Press-Enterprise I* before excluding the press and public from a juvenile proceeding.[212] However, the Ohio Supreme Court eclipsed this decision just two years later – without explicitly overruling it – by declaring that there is no qualified right of public access to juvenile court proceedings under the First Amendment and setting forth a much less strenuous balancing test.[213] That court held *In re T.R.* that a juvenile court may restrict public access to a juvenile proceeding "if, after hearing evidence of the issue, it finds that: (1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and (2) the potential for harm outweighs the benefits of public access."[214]

In 1989, the Utah Court of Appeals explicitly adopted the Georgia Supreme Court's balancing test set forth in *Florida Publishing*. However, that court concluded that there is no right of access to juvenile court proceedings under the United States Constitution or the Utah Constitution.[215]

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[209] In re J.S., 140 Vt. 458, 438 A.2d. 1125, 7 Media L. Rep. (BNA) 2402 (Vt. 1981).

[210] 7 Media L. Rep. (BNA) at 2405.

[211] Sherman Publishing Co. v. Goldberg, 443 A.2d 1252, 8 Media L. Rep. (BNA) 1489 (R.I. 1982); In the matter of N.H.B., 769 P.2d 844 (Utah App. 1989); In re T.R., 52 Ohio St. 3d 6, 556 N.E.2d 439, 17 Media L. Rep. (BNA) 2241 (Ohio, 1990), *cert. denied*, Dispatch Printing Co. v. Solove, 498 U.S. 958, 111 S.Ct. 386, 112 L.Ed.2d 396 (1990).

[212] Ohio ex rel Dispatch Printing Co. v. Petree, 15 Media L. Rep. (BNA) 2200 (Ohio Ct. App. 1988).

[213] In re T.R., 52 Ohio St. 3d 6, 556 N.E.2d 439, 17 Media L. Rep. (BNA) 2241 (Ohio 1990).

[214] 17 Media L. Rep. (BNA) at 2250.

DECISIONS BASED ON STATE STATUTES OR CONSTITUTIONS

The South Carolina Supreme Court concluded in 1985 that the public and the press have a qualified right of access to all court proceedings – including juvenile proceedings – under the Constitution of South Carolina and that the Legislature may impose limitations on this right. "However, when and if challenged by the public or the press, the decision of a judge to close any proceeding must be supported by findings which explain the balancing of interests and the need for closure of the proceeding," the court held.[216] Its decision was based solely on state constitutional grounds and made no reference to *Florida Publishing* or to *Richmond Newspapers* and its progeny.[217]

In 1987, the South Dakota Supreme Court concluded in *Associated Press v. Bradshaw* that hearings could be closed only after a trial judge applied a five-part balancing test quite similar to the test set forth in the *Press-Enterprise* cases, although the right of access was based on a South Dakota statute. The court held, "Closure of juvenile proceedings should not occur unless specific findings are made which demonstrate that closure is essential to preserve higher values and the order must be narrowly tailored to serve that interest."[218] However, as discussed earlier, the same court held in 1995 that the balancing test is no longer required because of a 1991 state law that requires closed hearings unless the trial judge finds compelling reasons to require otherwise. Therefore, current law in South Dakota provides a qualified statutory right of access, but "the legislature has modified this qualified right of access by requiring 'compelling reasons' before such access will be permitted."[219]

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[215] In the matter of N.H.B., 102 Utah Adv. Rep. 48, 769 P.2d 844 (Utah App. 1989).
[216] 333 S.E.2d at 338.
[217] Ex parte Columbia Newspapers, Inc., 286 S.C. 116, 333 S.E.2d 337 (S.C. 1985)
[218] 14 Media L. Rep. (BNA) at 1568-69.
[219] In re M.C., 23 Media L. Rep. (BNA) at 1463.

Like the South Carolina Supreme Court in the case discussed above, the Oregon Supreme Court based its juvenile court access decision on its state constitution.[220] In 1980, as *Richmond Newspapers* was pending before the U.S. Supreme Court, the Oregon court concluded that a juvenile court order excluding the press from a proceeding violated a provision of the Oregon Constitution stating, "No court shall be secret, but justice shall be administered, openly ... ." However, the court cautioned that its holding "should not be interpreted as guaranteeing the right of public access to all judicial proceedings," and declared, "[T]he public has a right of access co-extensive with the press."[221] The court also noted that the trial judge has authority to control access to prevent courtroom overcrowding or disruption of proceedings. The decision, in effect, struck down the Oregon juvenile court access statute in place at the time, but the statute remained on the books until it was repealed by the state Legislative Assembly in 1993.[222] As a result, Oregon now is one of only two states with no statute addressing access to juvenile court proceedings.[223]

OTHER REASONS FOR GRANTING ACCESS

Four courts have concluded that access to juvenile courts, especially in cases involving violent offenses, serves the public interest. For example, the Arizona Supreme Court in 1989 held that the Arizona Constitution did not require juvenile court proceedings to be held in private.[224] Thus, a juvenile court judge who allowed the media to attend a transfer hearing was found not to have abused his discretion. As the court wrote:

> Although the juvenile court must be concerned with the rehabilitation of youthful offenders, the public has an interest in knowing how a juvenile court performs that function. There is a legitimate concern by people to know that their courts are operating fairly and effectively. Closed or private hearings not only defeat the public's ability to gain such information, but they also tend to create

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[220] Oregonian Publishing v. Deiz, 289 Ore. 277, 613 P.2d 23, 6 Media L. Rep. (BNA) 1369 (Or. 1980).
[221] 6 Media L. Rep. (BNA) at 1371.
[222] 1993 Or. Laws c. 33 § 373 [repealing former Or. Rev. Stat. § 419.498(1)].
[223] *See* Or. Rev. Stat. § 419C.400 (1995).
[224] 160 Ariz. 16, 770 P.2d. 320, 16 Media L. Rep. (BNA) 1253 (Ariz. 1989).

> suspicion about the court's operation. The administration of justice openly can dispel the public's fears and demonstrate that the courts apply the law fairly and impartially.[225]

Similarly, the Indiana Supreme Court in 1982 concluded that it was not an abuse of discretion for a juvenile court judge to deny a defendant's motion to exclude the news media from his transfer hearing because the offense involved – robbery resulting in bodily injury – would be a felony if committed by an adult.[226] "Consequently, it fell within that class of proceedings for which access and disclosure are deemed generally to serve the best interests of the public," the court wrote.[227]

Three courts have concluded that the news media may be admitted at the judge's discretion under statutes allowing judges to admit those with a "direct" or "proper" or "legitimate" interest in the work of the court. For example, the Minnesota Supreme Court in 1978 found that it was not an abuse of discretion to admit reporters to juvenile proceedings.[228] "The news media have a strong interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power in juvenile courts is being exercised," and thus have a "direct interest" in the work of the court within the meaning of Minnesota's statute, the court concluded.[229]

The highest courts in two states concluded that their state legislatures intended to allow press or public attendance at juvenile hearings. The California Supreme Court, for example, noted that California's access provisions were taken verbatim from a draft statute prepared by a study commission on juvenile justice that also advocated allowing press attendance at juvenile hearings. In its opinion in *Brian W. v. Superior Court,* the California Supreme Court quoted the following passage from the study commission's report:

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[225] 16 Media L. Rep. (BNA) at 1257.
[226] Taylor v. Indiana, 438 N.E.2d 275, 8 Media L. Rep. (BNA) 2287 (Ind. 1982).
[227] 8 Media L. Rep. (BNA) at 2290.
[228] 269 N.W.2d 367, 4 Media L. Rep. (BNA) 1539 (Minn. 1978).
[229] 269 N.W.2d at 371.

> We believe the press can assist the juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs. We, therefore, urge juvenile courts to *actively encourage greater participation by the press.* It is the feeling of the Commission that *proceedings of the juvenile court should be confidential, not secret.*[230]

Thus, the California Supreme Court concluded, "[I]n vesting the judge with discretion to admit to juvenile court proceedings persons having a 'direct and legitimate interest in the particular case or the work of the court,' it was the purpose of the Legislature to allow press attendance at juvenile hearings."[231]

The Massachusetts Supreme Judicial Court issued a similar, albeit less expansive, decision in 1991.[232] Until 1990, the Massachusetts access statute required that in juvenile court proceedings, the judge "shall exclude the general public from the room, admitting only such persons as may have a direct interest in the case." In 1990, the state legislature added an exception to this provision for cases in which the juvenile is charged with first- or second-degree murder. Five juveniles charged with murder later challenged a judicial order admitting the public to their transfer hearing. But the Massachusetts Supreme Judicial Court affirmed the order, and concluded, "[I]t is reasonably clear that the Legislature intended generally that a judge not exclude the public from such a hearing."[233]

Finally, the Washington Supreme Court stands alone in concluding that while juvenile dependency proceedings at the trial level are confidential, appellate proceedings in such cases are not.[234] Washington's juvenile confidentiality statutes simply do not apply to appellate proceedings, the court concluded. Therefore, Washington's appellate courts must decide on a case-by-case basis whether closure is in the best interests of the child, and must apply a balancing test of competing interests for and against closure before a proceeding can be closed.[235]

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[230] Brian W. v. Superior Court, 3 Media L. Rep. (BNA) at 1994-95 (emphasis added by the court).
[231] *Id.* at 1995.
[232] News Group Boston, Inc. v. Massachusetts, 409 mass. 627, 568 N.E.2d 600, 18 Media L. Rep. (BNA) 2102 (Mass. 1991).
[233] 18 Media L. Rep. (BNA) at 2103
[234] In re J.B.S., 122 Wash.2d 131, 856 P.2d 694, 21 Media L. Rep. (BNA) 2048 (Wash. 1993).

The Supreme Court of Kentucky, which considered a similar case four years earlier, reached the opposite conclusion.[236] "To exclude the press at the district level, but admit them at the appellate level would tend to nullify the original intent and purpose of the legislature," the court concluded.[237]

REASONS FOR DENYING ACCESS

The most common reason state courts have given for denying access is that the juvenile's interest in confidentiality outweighs media and public interest in access. Eight of the decisions reviewed here came to that conclusion. One of these was the Kentucky case discussed above, in which the court concluded, "[The juvenile's] right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting."[238]

Other courts have used this reason to exclude the media following the media's disclosure of a juvenile's identity or in the face of the media's refusal to accept access on condition that the juvenile not be identified in coverage of the proceeding. For example, the District of Columbia Court of Appeals in 1991 reversed a trial judge's order that excluded *The Wall St. Journal* from a juvenile proceeding because that newspaper identified the juvenile in its pages, but did not exclude reporters from *The Washington Post* and other media that did not identify the juvenile.[239] All media had to be excluded once the juvenile's name was reported, the court concluded, because the District of Columbia statute allowed admission of the press "only if there is a reasonable assurance that the primary goal of protecting the child's anonymity can be achieved."[240] Furthermore, "[T]he statutory scheme requires us to hold that the respondent's right to anonymity trumps the media's interest in attending and reporting on proceedings in a specific juvenile case."[241] Similarly, the South Dakota Supreme Court in 1990 upheld a juvenile judge's closure order, despite the five-part balancing test then required in that state because "the media indicated that it [*sic*] would not preserve confidential information obtained at the juvenile proceedings if it were allowed to have access to such proceedings."[242]

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[235] 21 Media L. Rep. (BNA) at 2051.
[236] F.T.P. v. Courier-Journal, 774 S.W.2d 444 (Ky. 1989).
[237] *Id.* at 446.
[238] *Id.*
[239] In re J.D.C., 594 A.2d 70, 19 Media L. Rep. (BNA) 1040 (D.C. 1991).
[240] 19 Media L. Rep. (BNA) at 1041.

NONE OF THE ABOVE: CASES THAT DEFY CATEGORIZATION

Two of the decisions reviewed are hard to categorize as favoring either openness or closure. In the first, the South Dakota Supreme Court in 1990 reversed a trial judge's closure order in a particular case because the wording of the closure order did not limit its duration. But reversal came months after the ajudicatory hearing at issue had been completed, and thus the public and the media never gained access to the proceeding.[243]

In the second, reporters were allowed to attend dependency hearings but, after they published the juveniles' names, the trial judge refused to admit them to later hearings unless they agreed not to further identify the juveniles. The Illinois Supreme Court in 1992 held that this was not an unconstitutional prior restraint.[244] The court concluded that the *Richmond Newspapers* rationale for access to criminal trials did not apply to dependency proceedings, which involve juvenile *victims* of abuse or neglect, not juvenile *offenders* accused of committing crimes. The fact that this case involved a dependency proceeding, and that the newspaper obtained the names of the juveniles in the proceeding and not through its own investigation outside of the courtroom, was held to distinguish the case from the U.S. Supreme Court's decision in *Smith v. Daily Mail Publishing Co.* The court also concluded that the First Amendment role of the media "is not diminished by withholding the names of the juvenile victims" in dependency cases.[245]

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[241] *Id.* at 1046.

[242] In re Hughes County, 17 Media L. Rep. (BNA) at 1518.

[243] Sioux Falls Argus-Leader v. Young, 435 N.W.2d 864, 18 Media L. Rep. (BNA) 1045 (S.D. 1990).

[244] In re a minor, 149 Ill.2d 247, 595 N.E.2d 1052, 20 Media L. Rep. (BNA) 1372 (Ill. 1992).

FEDERAL CASE LAW

As discussed earlier, the Federal Juvenile Delinquency Act was enacted in 1938 and since has been amended. It provides that juveniles may be prosecuted in federal trial courts *only* when (1) the appropriate state court does not have jurisdiction or refuses to assume jurisdiction over the juvenile, (2) the state does not have available programs and services adequate for the needs of juveniles, or (3) the juvenile is charged with a violent felony or a specified drug crime and there is a substantial federal interest in the case sufficient to justify a federal prosecution.[246] The Act provides that in such prosecutions, "the court may be convened at any time and place within the district, in chambers or otherwise."[247] It also provides that the records in such cases shall be confidential,[248] and that unless a juvenile is prosecuted as an adult "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding."[249]

The first reported case involving a news media challenge to the confidentiality provisions of the Act was *Oklahoma Publishing Co. v. United States,* which was decided in 1981.[250] In that case, Oklahoma authorities charged a 16-year-old youth with murder but dropped the charges after concluding that the state did not have jurisdiction because the alleged crime took place "in Indian country." So, federal prosecutors charged the youth under the Federal Juvenile Delinquency Act. When a newspaper reporter attended one of the hearings in the case, the trial judge told him that he could be punished by contempt of court under the Act if the newspaper published the name or picture of the youth. In response, the newspaper challenged the statute, and a U.S. district judge concluded that it did not apply to members of the news media.[251] The judge also concluded that the case presented a controversy sufficient for declaratory judgment because "the chill here threatens the right of a newspaper to report events that take place in the public forum of the courtroom. Clearly, this is an area of recognized protection under the First Amendment."[252]

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[245] 20 Media L. Rep. (BNA) at 1377.
[246] 18 U.S.C. § 5032.
[247] *Id.*
[248] 18 U.S.C. § 5038(c).
[249] 18 U.S.C. § 5038(e).
[250] 515 F.Supp. 1255 (W.D. Okla. 1981).

There were no similar cases reported again until April 1994, when the U.S. District Court for the Eastern District of Wisconsin concluded that the Act did not prohibit media access to juvenile delinquency hearings as long as the juvenile's confidentiality was maintained.[253] The district judge's opinion explicitly invoked the *Press-Enterprise* cases, and stated that many of the U.S. Supreme Court's comments in *Press-Enterprise II* applied in this case.[254] The district judge found that public access would "play a role in assuring the propriety of the proceedings" because juvenile proceedings are typically tried without a jury. Furthermore, "[a]n inestimable factor in the court's analysis, is the 'community therapeutic value' of openness. ... This concern is equally persuasive in the juvenile justice system where the acts involved would be felony crimes if committed by an adult."[255]

A similar case, *U.S. v. A.D.*, was argued before the U.S. Court of Appeals for the Third Circuit in November 1993, and that court's decision was released in July 1994.[256] The Third Circuit concluded in a 3-0 opinion that the Act did not mandate closed hearings in all cases but gave district judges authority to regulate access on a case-by-case basis through a balancing of interests. In its opinion, the Third Circuit panel noted that although juvenile proceedings have no centuries-old tradition of openness and are not considered to be criminal proceedings, state juvenile court laws generally have not involved "blanket prohibitions of access."[257] Furthermore, "[t]he detention and delinquency proceedings called for in the Act are closely analogous to criminal proceedings, and all the public interests in criminal proceedings ... seem present and equally cogent here."[258]

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[251] *Id.* at 1259.
[252] *Id.* at 1258.
[253] U.S. v. Doe, 22 Media L. Rep. (BNA) 1693 (E.D. Wis. 1994).
[254] *Id.* at 1695.
[255] *Id.* at 1695-96 (citing *Press-Enterprise II*).
[256] 28 F.3d 1353 (3rd Cir. 1994).
[257] *Id.* at 1357.

Two different U.S. district courts came to contrary conclusions on the issue on the same day in September 1994. On September 8, Judge Trager of the U.S. District Court for the Eastern District of New York issued a bench ruling that relied on the Third Circuit opinion in *U.S. v. A.D.* to find that the proceeding at issue must be open "unless some specific need arises to close it."[259] Also that day, Judge Saris of the U.S. District Court for the District of Massachusetts issued a written opinion in *U.S. v. Three Juveniles*, the case involving the *Boston Globe* that was mentioned at the beginning of this paper.[260] Judge Saris concluded that the Act did not give district judges discretion to allow public access to juvenile proceedings, and that even if she did have such discretion, closure still would be necessitated by the "compelling governmental interest" of protecting the juveniles' anonymity.

The U.S. Court of Appeals for the First Circuit affirmed Judge Saris' closure order in July 1995 in a 3-0 opinion.[261] The Third Circuit panel acknowledged that the district judge's interpretation of the Act "raises some serious First Amendment concerns," but found the Globe's argument that the First Amendment created a right of access to proceedings under the Act "highly dubious ... particularly in light of the long, entrenched, and well-founded tradition of confidentiality regarding juvenile proceedings, and the compelling rehabilitative purposes behind this tradition."[262] Furthermore, the Third Circuit concluded, "[T]he language and policy of the Act, as well as the history of juvenile justice proceedings in this country over the past century, indicated that a court's exercise of its discretion to close juvenile proceedings is not an exception to some general rule of openness, but the norm."[263] The panel also rejected the Globe's argument, which seems inspired by *Press-Enterprise I,* that the public's interest in "seeing justice done" supported opening of the proceedings.[264] "It is precisely *because* the alleged crimes have provoked so much public outrage and antipathy that closure becomes more appropriate," the court wrote.[265]

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[258] *Id.* at 1358.
[259] U.S. v. Nelson, 22 Media L. Rep. (BNA) 2320 (E.D.N.Y. 1994).
[260] 862 F.Supp. 651, 22 Media L. Rep. (BNA) 2548 (D. Mass. 1994).
[261] U.S. v. Three Juveniles, 61 F.3d 86, 23 Media L. Rep. (BNA) (1st Cir. 1995).
[262] 61 F.3d at 90.
[263] *Id.* at 92.

The Globe filed its petition for writ of certiorari on November 24, 1995. The petition presented three questions: (1) whether the public has a presumptive First Amendment right of access to juvenile delinquency proceedings, (2) whether the First Amendment requires that juvenile delinquency proceedings can be closed only if the trial judge finds a substantial probability that publicity would prejudice the juvenile's interest in rehabilitation and that no reasonable alternatives to closure exist, and (3) whether the Federal Juvenile Delinquency Act supplants the public's common law right of access by establishing a presumptive rule of closure for proceedings conducted under the Act.[266]

As reasons for granting the writ, the Globe argued that (1) the issue of public access to juvenile delinquency proceedings was an important question of federal law that has divided lower courts, (2) the First Circuit's decision conflicts with decisions of state courts of last resort, (3) the First Circuit failed to properly apply the balancing test for determining whether the First Amendment right of access applies to juvenile delinquency proceedings, (4) the standard of review applied by the First Circuit permits closure of juvenile proceedings in violation of the First Amendment, and (5) the First Circuit's interpretation of the Federal Juvenile Delinquency Act as supplanting the public's common law right of access to judicial proceedings conflicts with the Third Circuit's interpretation of the Act and is an important question of federal law that has not been, but should be, settled by the Supreme Court.[267] As mentioned earlier, the Court denied review without comment on April 29, 1996.[268]

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[264] *See Press-Enterprise I,* 464 U.S. at 508-9 ("Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done.").

[265] *Id.* at 93.

[266] Petition for Writ of Certiorari, *supra note 27,* at i.

DISCUSSION AND CONCLUSIONS

The assessment of whether there is an *emerging* right of public access to juvenile court proceedings depends in large part on which vehicle of analysis is employed. When considering only the actual language of the state statutes, one can conclude that the statutes of twenty-nine jurisdictions favor closed hearings in most circumstances while the statutes of twenty-one jurisdictions favor open hearings in a smaller range of circumstances. This would appear to give statutes favoring closure a small numerical advantage. However, other factors suggest that this may not be an accurate conclusion.

Of the statutes favoring closure, all but one give judges discretion to admit the press or the public to juvenile proceedings. Furthermore, virtually all of the statutes allow for the possibility of either closure or openness. Thus, it is more accurate to conclude that current statutes are split roughly 50-50 between those favoring closure and those favoring openness.

However, the balance begins to tilt in favor of openness when one considers the fact that fourteen jurisdictions have amended their laws within the past decade to provide for greater openness. Seven states did so in 1995 alone. Eleven of the fourteen jurisdictions extended the presumption of openness only to cases involving serious or violent offenses, usually defined as offenses that would be felonies if committed by adults, while three jurisdictions established a presumption of openness for all juvenile proceedings. These were changes enacted by legislators elected by popular vote, and high-population states such as California, Texas and Michigan were among those that have done so. This is strong evidence suggesting that a significant and growing percentage of

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[267] *Id.* at iii-iv.

[268] 64 U.S.L.W. 3720, 3722 (U.S. April 29, 1996).

American citizens believe that juvenile court proceedings, at least in cases involving violent crimes like murder, rape or armed robbery, should be open to the public. Accordingly, these beliefs have the force of law in a significant and growing number of jurisdictions. Furthermore, more than twice as many state court decisions reviewed here favored openness than have denied public access.

In terms of federal case law, there have been too few decisions under the Federal Juvenile Delinquency Act to support the existence of a trend either way. At present, four decisions have favored access while two have favored closure. The fact that the decisions of the First and Third Circuits on this issue conflict with each other is of more significance than the numbers of cases decided because it suggests that a Supreme Court decision may be needed to settle the issue. But because the Court declined the opportunity to provide guidance in this area, the issue will continue to be fought case by case and circuit by circuit.

Is there a *constitutional* right of access to juvenile court proceedings under *Richmond Newspapers* and its progeny? The materials reviewed here provide ample support for such a conclusion under the history and function analysis of *Press-Enterprise II* and under other considerations set forth in *Richmond Newspapers* and *Globe Newspaper Co. v. Superior Court.*

First, the history of juvenile justice in the United States is not one of blanket prohibitions against public access, as some court decisions have suggested. From colonial days until the turn of the twentieth century, juveniles of age seven and older were tried in open court when they were charged with committing criminal offenses. This began to change with the rise of the juvenile court movement at the end of the nineteenth century, but the practice of private hearings was not firmly established in a majority of jurisdictions until well into the twentieth century. By the 1950s, some jurisdictions began providing greater public access. This process has continued to the present, and has greatly accelerated during the past ten years.

Second, public access to juvenile delinquency proceedings provides the same beneficial effects as does public access to the criminal trials of adults. When a shocking crime is committed by a juvenile, it is just as important to have an open proceeding to provide "an outlet for community concern, hostility, and emotion" as it is when the crime is committed by an adult. And just as "the crucial prophylactic aspects of the administration of justice cannot function in the dark" when adults are on trial, they also cannot work when juveniles are on trial for the same or similar offenses.[269] Closed juvenile proceedings, like closed trials for adults, "breed suspicion of prejudice and arbitrariness," and thus public access is essential "if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."[270]

Third, the Supreme Court's extension of due process rights to juvenile proceedings, and the fact that defendants in juvenile court sometimes face years of incarceration, make juvenile delinquency proceedings "sufficiently like a trial" to justify the conclusion that public access is essential to the proper functioning of the juvenile justice system. This is even more true for juvenile proceedings than for preliminary hearings in adult criminal cases, which cannot result in the conviction of the accused. If public access is "essential to the proper functioning" of such a proceeding, as the Supreme Court has held, then it also is essential to the proper functioning of a proceeding in which in a juvenile may be deprived of his or her liberty for a significant period of time.[271]

Fourth, just as public access to adult criminal trials "acts as an important check" against the power of the judge,[272] public access to juvenile delinquency proceedings helps protect juveniles from unbridled judicial discretion. From this perspective, public access to juvenile court hearings is even more important than in adult trials, since most juvenile cases are tried without a jury to check the power of the judge. Thus, in this context juvenile delinquency proceedings are analogous to preliminary hearings in adult criminal cases, where the Supreme Court concluded that the absence of a jury "makes the importance of public access even more significant."[273] Furthermore, the absence of a jury means that publicity in juvenile proceedings cannot cause the most significant problem usually attributed to publicity in adult trials: that extensive pretrial publicity may prejudice a jury against the defendant and thus violate the defendant's right to a fair trial.

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[269] *Richmond Newspapers*, 448 U.S. at 571.
[270] *Id.* at 596 (Brennan, J., concurring).
[271] *Press-Enterprise II*, 478 U.S. at 12.
[272] *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring).

Finally, if "safeguarding the physical and psychological well-being of minors" is insufficient to justify blanket closure of adult criminal trials during the testimony of juvenile *victims* of sexual assault,[274] then surely it is also insufficient to justify blanket closure of proceedings in which juveniles stand accused as *perpetrators* of sexual assault. If in such cases closure is sought to protect juvenile victims of sexual assault perpetrated by other juveniles, then closure is constitutional only if the party requesting it demonstrates "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[275]

This paper leaves other writers to answer the separate but related questions of whether the qualified right of public access extends to juvenile *dependency* proceedings and whether schemes that allow access on condition that juveniles not be identified are unconstitutional prior restraints on speech. But in terms of juvenile *delinquency* proceedings, especially those which involve offenses that would be felonies if committed by adults, there clearly is a right of public access under *Richmond Newspapers* and its progeny that passes the "tests of experience and logic."[276] Therefore, juvenile delinquency proceedings constitutionally cannot be closed unless the juvenile court judge first holds a hearing in which the public and the media are given an opportunity to present arguments against closure. Then, the proceeding can be closed only if the judge issues written findings articulate enough for appellate review that closure is essential to preserve higher values and that alternatives to closure have been considered.[277]

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[273] *Id.* at 13.
[274] Globe Newspaper Co. v. Superior Court, 457 U.S. at 607-8.
[275] *Id.* at 607.
[276] *Press-Enterprise II*, 478 U.S. at 9.

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[277] *Press-Enterprise I*, 464 U.S. at 510-11.

Linking Copyright to Home Pages

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Linking Copyright to Home Pages

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Abstract

The use of links to connect documents on the World Wide Web raises two important copyright questions: (1) does linking to a document constitute copyright infringement? and (2) are links copyrightable? Because links contain only the URL address of the document being linked to, they do not violate any of the copyright owner's exclusive rights. The URL itself is not copyrightable. Linking does not constitute contributory infringement either. This is because it is the server where the document is stored that makes the copy which is transmitted to the user.

Since links are addresses, a collection of links is copyrightable as a compilation. After *Feist*, a compilation of links is afforded only limited copyright protection. The person who creates a collection of links can only copyright the selection and arrangement of the links. Others can use many of the identical links without violating the first author's copyright.

Linking Copyright to Home Pages

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Linking Copyright to Home Pages

Introduction

Mary just started her own business. She created a Web page where users can follow her links to the coolest sites on the World Wide Web. It took her weeks of searching to find the best sites and then a few more days to create all the links--which she plans on updating once a week. She set up a password system so that anyone who wants to use her Web page has to pay her ten dollars a month. In her first four months she made almost five thousand dollars. Now the author of one of the pages she has linked to is suing her for copyright infringement. He wants her to either share her profits or stop linking to his document. That's not her only headache. She's thinking of filing her own copyright infringement suit against a former friend who is setting up a business similar to hers. He's created links to many of the same documents.

How will these cases turn out? Can Mary create links to a Web site without getting the author's permission? Can she stop her competitor from copying her links? Many law reviews, trade journals, and daily newspapers have published articles concerning copyright in the digital age, but only a handful have discussed one of the most common potential forms of copyright infringement--that of "linking" different documents on the Internet.[1]

One reason links have received such little copyright attention is that linking documents is still a relatively new phenomenon and there have been no court cases to date involving links. However, these issues will become more important as publishers seek to assert their property rights in information available on the Internet. A recent issue of a business journal framed the question succinctly: "If I create a home page and I have my copyrighted material on that page with my trademark, and someone unilaterally links up to it, this raises the question of whether they're publishing and they're violating my copyright."[2]

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[1] *See, e.g.,* Maxine Lans Retsky, *The Internet: Answers or More Questions?* MARKETING NEWS, Dec. 4, 1995, at 7; Pamela Samuelson, *Intellectual Property Rights and the Global Information Economy,* COMM. OF THE ACM, Jan. 1996, at 23; Pamela Samuelson, *Fair Use For Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega,* 1 J. INTELL. PROP. L. 49 (1993); Jenevra Georgini, *Through Seamless Webs and Forking Paths: Safeguarding Authors' Rights in Hypertext,* 60 BROOK. L. REV. 1175 (1994); Lance Rose, *World Wide Web Can Ensnare Unwary Users; Potential Copyright Problems Abound,* N.Y.L.J., Feb. 27, 1995, at S3.

Linking documents is akin to placing references to other works in a printed text. For example, a new, printed article might refer to an already published article in *Wired* magazine. The reader of the new article would have to find the correct issue of *Wired* magazine in order to see the original article. The World Wide Web makes it possible for an electronic version of the new article to be linked to the on-line version of the *Wired* article. When the reader reaches the point in the article where the *Wired* article is referenced, the reader could select the link and immediately see the *Wired* article. It has been widely noted that this ability to link documents is revolutionizing both information retrieval and the act of reading itself.[3]

This Article will examine two related copyright questions involving links: (1) does linking to a document constitute copyright infringement, and (2) are links copyrightable? After a brief discussion of the technology involved, this Article will argue that linking does not infringe on an author's copyright.[4] It will then discuss to what extent links are protected by copyright.

In our hypothetical scenario, Mary may be liable for copyright infringement in two distinct ways. If the links she creates violate any of the author's exclusive rights, Mary may be liable for direct infringement. If, on the other hand, Mary's customers violate any of the author's rights by following the link, then Mary may be liable for contributory infringement. The basic premise of this article is that it is the author of the document, not Mary, who reproduces the article for Mary's customers. Links are simply addresses designating the location of a document. Therefore Mary is not committing either direct or contributory copyright infringement.

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[2] Joanne Wojcik, *Internet Publishing Raises Legal Questions; Copyright Violations Are Possible*, BUS. INS., Feb. 26, 1996, at 21 (quoting William Lard, general counsel for SunSoft Inc.).

[3] *See, e.g.*, GEORGE LANDOW, HYPERTEXT: THE CONVERGENCE OF CONTEMPORARY CRITICAL THEORY AND TECHNOLOGY (1992), THEODOR NELSON, COMPUTER LIB/DREAM MACHINES (rev. ed. 1987).

[4] Previous commentators (*See, e.g.*, Samuelson *supra* note 1 and Georgini *supra* note 1) have tended to rely on a fair use argument to justify links. Fair use is an affirmative defense that places the burden of proof on the defendant. Because it is based on an equitable rule of reason and is case-specific, the outcome is often uncertain. While fair use presents many valid arguments applicable to this topic, they are beyond the scope of this paper. This author argues that a fair use defense is not necessary to escape liability for copyright infringement.

Because links are addresses, Mary is providing her customers with a database. The United States Supreme Court limited the scope of copyright with regard to databases in *Feist Publications, Inc. v. Rural Telephone Service Co.*[5] So Mary's links enjoy very thin copyright protection. Mary may copyright the selection and arrangement of her links, but not the links themselves.

I. Surf's Up! A Technology Primer

Few Americans over the age of five could have survived 1995 without hearing at least one reference to the Internet or the Information Highway.[6] Some researchers estimate that in the United States alone, as many as 15 million people already have access to the Internet,[7] and the number of users is expected to grow exponentially in the next year alone.[8]

The fundamentals of the Internet and the World Wide Web are fairly straightforward. The Internet is both the hardware which connects thousands of computer networks worldwide,[9] and the protocols which allow these networks to communicate with each other.[10] The Internet includes e-mail, discussion groups, chat groups, and information resources.[11]

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[5] 499 U.S. 340 (1991).

[6] The hyperbole surrounding this new technology has quickly led most commentators to uncritically accept the *super* superlative. Thus, the de facto reference is now "Information *Super*highway."

[7] Daniel Akst, *Postcard From Cyberspace*, L.A. TIMES, Nov. 6, 1995, at D4.

[8] In 1996, 89 million people around the world are expected to use the Internet. *GEO Interactive Announces the Mac Version of the EMBLAZE Creator--An Advanced Authoring Tool Enabling Web Site Creators to Create Their Own Animated HTML Pages*, Bus. Wire, Mar. 11, 1996, *available in* LEXIS, News Library, CURNWS File.

[9] BRENT HESLOP & LARRY BUDNICK, HTML PUBLISHING ON THE INTERNET FOR WINDOWS 4 (1995)

Each individual network that is connected to the Internet usually consists of a host computer (the server) and a number of remote computers or terminals (the clients).[12] For example, most universities have computer networks whereby hundreds of personal computers (clients) are connected to a large mainframe computer (the server) via fiber optic cable. Users often can connect to the server from a remote location using a modem and a telephone line.[13]

The Internet is the interconnection of thousands of these servers, each with its own Internet Protocol (IP) address.[14] Every document has its own "address" on the server, similar to the way files are stored in a personal computer.[15] A user can access a document by specifying its address, which is known as its Universal Resource Locator (URL).[16] A primary purpose of servers is to transmit documents to whomever requests them.

There are a variety of protocols, such as ftp, telnet, and gopher, that allow a client to search for, and request documents from, a server.[17] The World Wide Web (WWW or Web) is a newer set of protocols that utilizes HyperText Transmission Protocol (HTTP) for communication between the server and the client.[18] Client programs, such as Netscape's Navigator and

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[10] PAUL GILSTER, FINDING IT ON THE INTERNET 21 (1994).

[11] There are a number of reference books that describe the various services available on the Internet. *See, e.g.*, HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE (1994).

[12] *Id.* at 13.

[13] *Id.* at 35.

[14] *Id.* at 47.

[15] In fact, new technology permits personal computers to function as servers, eliminating the need for costly mainframe computers. HESLOP & BUDNICK, *supra* note 9, at 332.

[16] *Id.* at 9. A typical URL may read: http://www.indiana.edu/~libweb/index.html The URL consists of various segments: the protocol used to retrieve it, the server on which it is located, and the file extension where the document is stored in the server's memory. *Id.* at 12.

[17] *Id.* at 4. For detailed information on the various protocols and software programs used to search the Internet, see HAHN & STOUT, *supra* note 9.

[18] HESLOP & BUDNICK, *supra* note 9, at 7.

Microsoft's Explorer, request information from servers. These programs are known as Web browsers.

One advantage of HTTP is that it can "read" older protocols such as ftp and gopher. Another advantage is that HTTP lets the author use graphics, video, and audio in her documents. A third advantage (the topic of this paper) is that the programming language of HTTP allows documents to be linked together--even if they are stored on different servers.[19] This language, known as HyperText Markup Language (HTML), is how Web sites (home pages) are typically created.[20]

Documents which include HTML codes are known as Web documents. An author who creates a Web document can create links by inserting a special code into the text or graphics. The code contains the URL of whatever document the author wishes to link her document to. When a user clicks on (selects) the text or graphic, the browser requests whatever document is specified by the URL.[21] The server where the document is located then transmits the information to the Web browser.

There are three different types of links: intra-page, intra-system, and inter-system.[22] Intra-page links connect different parts of the same document. For example, a long document may have a link at the end which takes the user back to the beginning. Intra-system links connect different documents on the same server. An intra-system link on a university's server might connect the home pages of two different departments. An inter-system link connects documents on different servers. Thus, a document concerning intellectual property law on a university's server might be connected to the home page of the United States Patent Office. Millions of documents can be linked together through the World Wide Web.

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[19] *Id.* at 97.

[20] Another option is to use a portable document program that allows the user download the file and the software required to view it. This way the user can view the file after disconnecting from the Internet. *Id.* at 15.

[21] *Id.* at 9.

[22] *Id.* at 97.

Home pages do not have a standard form.[23] They range from a single screen containing only text and no links, to elaborate multi-screen documents with audio, video, and hundreds of links. Many individuals have home pages where they include biographical data and links to some of their favorite Web sites. For example, an individual may include her name, e-mail address, and a photograph of herself on her home page. If her hobbies included kayaking, she might include a link to a home page created by a regional kayaking club.

Businesses, universities and other organizations often have home pages that include extensive links to other documents maintained by the organization and related organizations. Thus, the local kayaking club's home page might be linked to its membership list, a calendar of upcoming events, a description of the club's history, and photos from a recent kayaking trip. It might also be linked to the home pages of other kayaking clubs around the world.

The World Wide Web is only a few years old,[24] yet its growth has been phenomenal. One survey estimates that the Web grew from 1 million users in 1994 to 8 million users in 1995.[25] Another survey predicts the Web will have more than 30 million users by 1997.[26] As of December 1995 there were 22 million home pages on the Web.[27]

Most universities allow their faculty, staff, and students to create Web sites on the university's server for free. Many businesses have also established their own Web sites, either by purchasing their own server, or by leasing space on an existing server. Anyone who wants to create his or her own home page can rent space on servers from one of countless Internet service providers.[28]

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[23] For a description of different types of home pages, see *id.* at 300-13.

[24] The first Web browser was called Mosaic. It was made available to the public by the National Center for Supercomputing Applications (NCSA) in Nov. 1992. *Id.* at 5.

[25] Bob Metcalfe, *From the Ether: Do the Numbers Add Up to an Intoxicated Internet Facing a Hangover?* INFOWORLD, Mar. 11, 1996, at 55.

[26] *GEO Interactive, supra* note 8.

[27] James Coates, *Clearing a Path in Web's Clutter,* CHI. TRIB., Apr. 28, 1996, Business at 1.

Before exploring the copyright issues involved in creating links, a few important technical aspects of links need to be noted. First, Document *A* can be linked to Document *B* without the author of *B*'s knowledge or consent. However, *A* cannot link to a specific word or picture in *B* unless that word has its own URL address.[29] Thus, links generally go to the beginning of a document or to a link within the document that has its own URL address.

Second, the link is a one way street--sort of. Someone browsing through *A* can follow *A*'s link to *B*. That user can backtrack from *B* to *A* because her Web browser "remembers" the path that was taken. However, a user who starts at *B* has no way to connect to *A*, and furthermore, doesn't even know a link exists from *A* to *B*. So if the author of document *A* wants to link to a specific section of *B* or have there be a two-way link, she must contact the author of document *B* to arrange the link.

The third important technical note is that for a user to "view" a document, that document must be placed into the random access memory (RAM) of the user's computer. Otherwise, no image will appear on the user's monitor.[30] Whether this constitutes the making of a copy is one of the heated issues in the current copyright debate, and one which will be discussed later in this paper.

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[28] HESLOP & BUDNICK, *supra* note 9, at 315-24. The cost for renting space on a server can be as low as ten dollars per month. *Id.* at 16.

[29] *Id.* at 109.

[30] *Id.* at 7.

Finally, the author of document *B* can use a variety of security measures to prevent anyone from viewing (or linking to) her document. These measures include encryption of the document, or various levels of passwords to prevent unauthorized access. In this way, the author of *B* can charge users each time they access the document.[31]

II. Does Linking Infringe on Copyright?

Copyright grew out of the development of the printing press in the fifteenth century, and it has been adapting to new communication technologies ever since.[32] The rapid expansion of the Internet has led to many proposals for modifying the current law,[33] including a recent proposal by the Clinton Administration's Information Infrastructure Task Force.[34] The Task Force's proposal would codify recent controversial court decisions regarding the Internet and computers that are discussed below.[35] Some scholars feel these modifications to copyright law will favor the copyright industries at the expense of the general public.[36] They argue that the current law is adequate to protect the copyright owner's interests.

The 1976 Act grants the owner of a copyrighted work certain exclusive rights, which are themselves subject to limitations contained elsewhere in the statute. The most important limitation is that copyright protects only original expression, not facts or ideas.[37] The copyright owner has the exclusive right to (1) reproduce the work, (2) prepare derivative works, (3) distribute copies of the work, (4) perform the work publicly (excepting pictorial, sculptural, or graphic works, sound recordings and architectural works), and (5) display the work publicly (excepting sound recordings and architectural works).[38] Because these rights may overlap, someone may infringe on more than one right at the same time.[39]

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[31] *Id.* at 10-11.

[32] MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.2 (2d ed. 1995).

[33] The last major revision of the copyright statute occurred in 1976 with the passage of the Copyright Act of 1976, 17 U.S.C. §§ 101-803 [hereinafter 1976 Act].

[34] INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995) [hereinafter WHITE PAPER].

[35] The WHITE PAPER'S proposed changes to the 1976 Act have been incorporated into a bill currently before Congress. S. 1284, 104th Cong., 1st Sess. (1995); H.R. 2441, 104th Cong., 1st Sess. (1995).

[36] *See e.g.* Jessica Litman, *The Herbert Tenzer Memorial Conference: Copyright In the Twenty-First Century: The Exclusive Right to Read,* 13 CARDOZO ARTS & ENT. L.J. 29; Pamela Samuelson, *Intellectual Property Rights and the Global Information Economy, supra* note 1.

[37] "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b).

To successfully sue for copyright infringement, the plaintiff must prove: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[40] For the purposes of this article, we will assume that Document *B* consists of copyrightable subject matter and that its author holds a valid copyright in the work.

The author of *A* may be liable for infringement in one of three ways: (1) direct infringement, (2) vicarious infringement, or (3) contributory infringement. Direct infringement occurs if the link itself violates one of *B*'s five exclusive rights. Vicarious or contributory infringement may result if, by selecting the link, the *user* violates any of *B*'s exclusive rights.

Vicarious infringement occurs when the third party (the author of *A*) has the ability to supervise or control the direct infringer (the user), and the third party benefits from the infringement.[41] Contributory infringement occurs when the third party knows the infringement is taking place and "induces, causes, or materially contributes to the infringing conduct..."[42] One court summed up the distinction between the two by saying, "[J]ust as benefit and control are the signposts of vicarious liability, so are knowledge and participation the touchstones of contributory infringement."[43]

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[38] 17 U.S.C. § 106.

[39] LEAFFER, *supra* note 32, § 8.2, at 222.

[40] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 548 (1985)). Infringement can occur without copying taking place in the literal sense, as when one unlawfully distributes or displays a work. *See* LEAFFER, *supra* note 32, § 9.2, at n.3.

[41] Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (company that leased space to record department was liable for sale of bootleg records because of beneficial relationship).

[42] Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (management firm that authorized performance of copyrighted works is liable for contributory infringement).

While the author of *A* may benefit from a user selecting her link to *B*, she cannot supervise or control the user. Therefore, a link from *A* to *B* does not involve vicarious infringement. However, by providing a link, the author of *A* is inducing the user to view *B*. If *viewing B* violates any of the copyright owner's exclusive rights, the author of *A* may be liable for contributory infringement.[44] But there can be no contributory infringement without direct infringement.[45]

Contributory infringement is an important concern for the development of the Internet. Internet service providers, who run the servers that make up the Internet, are justly concerned about contributory liability. Courts have found bulletin board operators to be liable for infringing actions committed by their users.[46] This section will analyze the author's exclusive rights in terms of both direct and contributory infringement.

A. The reproduction right.

1. Direct infringement.

The first enumerated right is the right to reproduce the work.[47] The reproduction right is violated when a copy is made of the original work. According to the 1976 Act, a copy is a material object "in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[48]

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[43] Demetriades v. Kaufmann, 690 F. Supp. 289, 293 (S.D. N.Y. 1988) (family that sold lot is not liable for copyright infringement when purchaser copied architectural plans to build house on the lot, even though family benefited from the sale and knew of the infringing activity. The court distinguished knowledge as part of the test for contributory infringement and benefit as part of the test for vicarious infringement. The court held that vicarious infringement requires benefit *and* control; contributory infringement requires knowledge *and* participation) .

[44] It is important to distinguish between viewing *B* and any other potentially infringing act the user may engage in. By creating a link, the author of *A* is not inducing the user to print or store a copy of *B*, only to view it.

[45] Religious Technology Center v. Netcom On-line Communications Servs., Inc., 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

[46] *See infra* text accompanying notes 70-72, and discussion in parts II.C.1, II.C.2.

[47] 17 U.S.C. § 106(1).

The link from *A* to *B* only contains the URL address of *B*. In creating the link, the author of *A* has not reproduced any part of *B* except for *B*'s URL. A URL is a "fact," and as such, it is not protected by copyright.[49] One could argue that since the URL for *B* includes whatever name *B*'s author gives to the document, it contains protected expression.[50] However, short phrases such as titles and names are generally not copyrightable.[51] Thus, *A* has not directly infringed *B*'s reproduction right.

2. Contributory infringement.

When a user selects a link from *A* to *B*, the information contained in *B* is downloaded into the random-access memory (RAM) of the user's computer.[52] When the computer is turned off, all the information in RAM is lost. Keep in mind that a copy must be fixed in a tangible medium.[53] A series of controversial cases have suggested that loading a computer program into RAM for viewing creates a fixed copy and therefore may constitute copyright infringement.

The most important of these cases is *MAI Systems, Corp. v. Peak Computer, Inc.*,[54] in which the defendant was a service company that repaired computers that were manufactured by MAI. When the service technicians turned on the MAI computer, the operating software was automatically loaded from the computer's hard drive to the same computer's RAM. The Court of

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[48] 17 U.S.C. § 101.

[49] 17 U.S.C. § 102(b).

[50] The document's author can create the name of the file extension and, if the author also owns the server, she can create its name as well. Both of these names are a part of the URL address. For a discussion on Internet addressing, see HAHN & STOUT, *supra* note 11, at 47-58.

[51] LEAFFER, *supra* note 32, § 2.7 (C) & n.50 (1995).

[52] HESLOP & BUDNICK, *supra* note 9, at 7.

[53] 17 U.S.C. § 101. *See supra* text accompanying note 48.

[54] 991 F.2d 511 (9th Cir. 1993) *cert. dismissed,* 114 S. Ct. 671 (1994).

Appeals for the Ninth Circuit held that loading the software into RAM created a copy. The court cited the report of the National Commission on New Technological Uses of Copyrighted Works (CONTU), which stated that, "the placement of a work into a computer is the preparation of a copy..."[55] As the *MAI* court duly noted, neither the prior cases which it cited for support, nor the CONTU report itself, distinguished between placement in RAM or read-only memory (ROM).[56]

The context of the CONTU statement was ensuring that the rightful possessor of a copyrighted computer program would be able to use the program on her computer.[57] In this sense, the Report seemed to be contemplating the right of the user to load a copy of the program into the computer *from a floppy diskette*. There is no indication that the authors of the report believed that once a program was in the computer, its transfer from ROM to RAM would also be considered a copy.

The *MAI* court stated that, "[S]ince we find that the copy created in RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act."[58] The court argued that since the computer may be left on indefinitely, the copy in RAM is "fixed in a tangible medium" as required by the 1976 Act.[59] This interpretation of the 1976 Act has been endorsed by *MAI*'s progeny,[60] and the Information Infrastructure Task Force.[61] By this reasoning, a slide projector which projects an image on a screen is making a copy. After all, the image on the screen can be "perceived, reproduced or otherwise communicated" for as long as the slide projector is left on.[62] Loading a document into RAM for the purpose of displaying on a monitor is directly analogous to projecting a slide onto a screen.

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[55] CONTU, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 13 (1979) (hereinafter CONTU REPORT).

[56] *MAI*, 991 F.2d at 519.

[57] CONTU REPORT *supra* note 55, at 13.

[58] *MAI*, 991 F.2d at 519 (quoting 17 U.S.C. § 101).

[59] *Id.*

[60] Advanced Computer Servs. of Mich. v. MAI Sys. Corp., 845 F. Supp. 356, 363 (E.D. Va. 1994); Triad Sys. Corp. v. S.E. Express Co., 31 U.S.P.Q.2d 1239, 1243-44 (N.D. Cal. 1994) *aff'd in part, rev'd in part,* 64 F.3d 1330 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 1015 (1996). Both these cases contained facts almost identical to *MAI*, and each held that a third party booting up operating system software into RAM constituted copyright infringement.

[61] WHITE PAPER, *supra* note 34, at 28.

The *MAI* decision, and its endorsement by the Information Infrastructure Task Force have been roundly criticized by leading copyright scholars.[63] The *MAI* decision appears to be at odds with the legislative history of the 1976 Act. The House report accompanying the Act states, "[T]he definition of fixation would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or *captured momentarily in the 'memory' of a computer*."[64] The report went on to distinguish between a reproduction and a display:

> "Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in a tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, *the showing of images on a screen or tube would not be a violation of clause (1)* [the reproduction right], although it might come within the scope of clause (5) [the public display right].[65]

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[62] Even if one argued that the program in RAM represents an intermediate step between ROM and the monitor, the conclusion is the same: the slide is equivalent to the program in ROM; its projection on to the projector's lens is equivalent to the program in RAM (since it will disappear when the machine is turned off); and its projection onto the screen is equivalent to the program being displayed on the monitor.

[63] *See* Litman, *supra* note 36 at 41; Samuelson, *Intellectual Property Rights and the Global Information Economy*, *supra* note 1 at 23.

[64] H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess. 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (emphasis added).

[65] *Id.* at 62, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675 (emphasis added).

Thus, the legislative history suggests that Congress did not intend for a document temporarily stored in RAM to be considered a reproduction. If viewing *B* does not create a copy, then there is no direct infringement by the user.

Even if their interpretation of the law is wrong, one must accept that the courts have held that a document in RAM is a copy. Does this mean the viewer has infringed *B*'s reproduction right? To answer this question one must determine who made the copy that resides in the user's RAM. The author of *B* placed the document on a server. When a user who is viewing *A* clicks on (selects) the link to *B*, the user's Web browser requests the document from the *B*'s server. It is *B*'s server that actually generates the "copy" which is sent to the user.[66] Thus it is *B,* not *A*, that authorizes the reproduction.

A leading Supreme Court case involving contributory infringement offers insight as well. In *Sony Corporation of America v. Universal City Studios, Inc.*,[67] the issue was whether Betamax videotape recorders (VTRs) sold to consumers by Sony were being illegally used to record broadcast television programs. Universal argued that Sony was knowingly supplying the means by which consumers were committing copyright infringement, and therefore Sony should be liable for contributory infringement. Universal relied heavily on *Kalem Co. v. Harper Bros.*;[68] in which the producer of an unauthorized film dramatization of a copyrighted book was held liable for selling the film to distributors, thereby contributing to the infringement of the author's public performance right.

In rejecting Universal's argument, the *Sony* Court distinguished *Kalem*, stating, "The producer in Kalem did not merely provide the "means" to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. *Sony in the instant case does not supply Betamax consumers with respondents' works; respondents do*."[69] As in *Sony*, it is *B*'s author who is supplying the user with the work. *A* is simply providing the user with an alternative method for viewing *B* (just as time-shifting in *Sony* provided the viewer with an alternative method for viewing Universal's programs).

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[66] HESLOP & BUDNICK, *supra* note 9, at 7.
[67] 464 U.S. 417 (1984).
[68] 222 U.S. 55 (1911).

Recently, the *MAI* decision was applied to Internet documents for the first time in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*[70] In *Netcom*, an Internet user posted Religious Technology Center (RTC) documents on a USENET discussion group. Netcom operated one of the servers which stored and distributed the discussion group. In a footnote, the court said that under *MAI*, "Browsing technically causes an infringing copy of the digital information to be made in the screen memory..."[71] However, later in the same footnote, the court said that, "[Browsing] is the functional equivalent of reading, which does not implicate the copyright laws and may be done by anyone in a library without the permission of the copyright owner. [Even if one rejects the reading analogy], [a]bsent a commercial or profit-depriving use, digital browsing is probably a fair use."[72] Since viewing a document does not infringe the reproduction right, providing a link does not constitute contributory infringement.

B. The adaptation right.

1. Direct infringement.

The copyright owner's second exclusive right is the right to prepare derivative works (the adaptation right).[73] According to the 1976 Act, a derivative work is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which [the preexisting] work may be recast, transformed, or adapted."[74] The purpose of the adaptation right is to allow the copyright owner to control more than simply verbatim forms of copying.[75]

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[69] *Sony*, 464 U.S. at 436 (emphasis added).
[70] 907 F. Supp 1361 (N.D. Cal. 1995).
[71] *Id* at 1378, n.25.
[72] *Id.*
[73] 17 U.S.C. § 106(2).

Generally, to violate the derivative right, the infringing work must copy part of the underlying work.[76] As discussed in the previous section regarding the reproduction right, a link from *A* to *B* does not incorporate or copy any portion of *B*. Thus, a link does not create a derivative work.

2. Contributory infringement.

One commentator has suggested that linking documents may create a derivative work by creating a "literary 'add-on.'"[77] An add-on modifies an existing work and is used in conjunction with that work. If *A* contains links to specific sections of *B*, one could argue that *A* modifies the way a user views *B*. In effect, *A* is creating an abridged version of *B*. With printed texts, *A* would need to copy the desired sections of *B* to be an abridgment (and, hence, a derivative work). But with links on the World Wide Web, *A* can create an abridged version of *B* without copying. Thus, the notion that *A* is an add-on (*i.e.* a supplementary work). The "add-on" concept has appeared in recent court cases involving computer programs.

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[74] 17 U.S.C. § 101.

[75] *See* LEAFFER, *supra* note 32, § 8.5.

[76] *Id.* In one extreme case, an answer manual was found to be an infringing derivative work of a textbook even though no part of the textbook was reproduced. Addison-Wesley Publishing Co. v. Brown, 223 F. Supp. 219 (E.D. N.Y. 1963). However, this decision was handed down before the passage of the 1976 Act. *See,* Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 967 (9th Cir. 1992) (stating that the legislative history of the 1976 Act indicates that "the infringing work must incorporate a portion of the underlying work in some form.") (quoting 1976 U.S.C.C.A.N. 5659, 5675) *cert. denied,* 507 U.S. 985 (1993). The House report accompanying the 1976 Act states, "[T]o constitute a violation of section 106(2) [the right to prepare derivative works], the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause." H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess. 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

[77] Georgini, *supra* note 1, at 1191-92.

In *Midway Manufacturing Co. v. Artic International, Inc.*,[78] the Court of Appeals for the 7th Circuit ruled that a computer chip manufactured by Artic to speed up a Galaxian video game manufactured by Midway infringed on Midway's copyright. The court ruled that the speeded up version of the video game constituted a derivative work. Artic argued that speeding up the video game was like speeding up a phonograph record and so should not be considered a derivative work. The court rejected this argument based on the fact that there is a market for speeded up video games while there is no market for speeded up phonograph records.[79]

Almost a decade later, a similar case was heard in the 9th Circuit. In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,[80] Galoob manufactured a device (a "Game Genie") to be inserted between a Nintendo home video game cartridge and the Nintendo home video game control unit. The device could be programmed to change certain characteristics of Nintendo video games. The court ruled this was not a derivative work and distinguished it from *Midway v. Artic* by pointing out that the earlier case involved substantial copying of a ROM chip while Galoob's device involved no direct copying. The court also noted that the device manufactured by Artic was used in the commercial setting of a video arcade, while Galoob's device was used in a noncommercial home setting.[81]

The *Galoob* court stated in *dicta* that derivative works should not encompass works whose sole purpose is to enhance the underlying work. Neither a spell-checking program used in conjunction with a word processor, nor a kaleidoscope that allows one to view a work in a new way should be considered a derivative work. The court said, "The Game Genie is useless by itself; it can only enhance, and cannot duplicate, a Nintendo game's output. Such innovations rarely will constitute derivative works under the Copyright Act."[82] The *Galoob* court went on to state that even if the Game Genie were a derivative work, its use should be considered a fair use.[83]

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[78] 704 F.2d 1009 (7th Cir. 1983), *cert. denied*, 464 U.S. 823 (1983).
[79] *Id.* at 1013.
[80] 964 F.2d 965 (9th Cir. 1992).
[81] *Id.* at 969.

The *Galoob* court ruled that a computer add-on that does not incorporate any part of the underlying work is not a derivative work. Under the same reasoning, a "literary add-on," such as a series of links, should not be considered a derivative work either.[84] The links from *A* to *B* cannot exist independently of *B*. Unlike a printed abridgment or adaptation of a work, the links do not duplicate the original work or act as a substitute for it.

C. The distribution right.

1. Direct infringement.

The copyright owner has the exclusive right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[85] The distribution right allows the copyright owner to sue a distributor of unauthorized copies even if that distributor did not make the copies himself. This has been an especially important right with regard to the Internet, since the person who distributes a document on the World Wide Web does not necessarily make a copy.

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[82] *Id.*

[83] *Id.* at 972.

[84] *See* Samuelson, *supra* note 1, at 114.

[85] 17 U.S.C. § 106(3). The bill currently before Congress would modify the wording of §106(3) by adding "transmission" after "lending." *See supra* note 35. This would essentially codify the court decisions discussed in this section.

In *Netcom*, where a user placed an RTC document on the Netcom computer, the court rejected RTC's argument that Netcom should be liable for direct infringement of RTC's distribution right. The court reasoned that only the person who uploads the document to the server should be liable for direct infringement.[86] Similarly, in *Sega Enterprises, Ltd. v. MAPHIA*,[87] a bulletin board operator was found liable for contributory infringement rather than direct infringement for allowing users to upload and download copyrighted Sega video games. These cases suggest it is the person who places the document on the server who is liable for direct infringement of the distribution right.[88] Since *A* merely provides a link to the server where *B* is located, the author of *A* should not be liable for direct infringement.

A useful analogy is a telephone answering system. One can program a number into speed dial and then call the number to reach a business's answering machine and listen to their outgoing message.[89] *B*'s server is like an answering machine. When *B*'s author places *B* on the server, it is akin to placing an outgoing message on the answering machine. The URL that designates *B*'s location is the "phone number" used to reach the answering machine. When the author of *A* creates a link to *B*, she has essentially put *B*'s phone number (the URL) into a speed dial memory.[90] When the user selects the link, the user's Web browser "calls" *B*'s server. *B*'s answering machine (the server) then transmits the outgoing message (*B*) to the user's Web browser for the user to view. The crucial point is that *A* does not control the distribution of *B*. If *B*'s author no longer wants to distribute *B*, she can take the document off the server or restrict access with encryption or passwords. So even if a copy of *B* has been distributed, the distribution is being made by the author of *B*, not *A*.

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[86] *Netcom*, 907 F. Supp. at 1372.

[87] 857 F. Supp. 679, 686-87 (N.D. Cal. 1994).

[88] *But see*, Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (in which a bulletin board operator was found liable for direct infringement for allowing users to upload and download copyrighted photographs from Playboy magazine).

[89] Many newspapers now offer a similar service whereby readers can call a local telephone extension to here prerecorded information such as weather updates and sports scores.

[90] The alternative to a link would be for the author of *A* to simply include *B*'s URL in the text. The user could then manually type the URL into her Web browser to access *B*. Thus, the link which *A* creates simply speeds up this process by eliminating the need for the user to type *B*'s URL on the command line.

2. Contributory infringement.

As long as the copyright owner of *B* has placed it on the server, its distribution is authorized and *A* cannot be held liable for contributory infringement. But suppose the author of *A* creates a link to a document that has been placed on a server without the copyright owner's authorization. If the author of *A* has knowledge of the direct infringement, she may be liable for contributory infringement, since her link encourages the further distribution of the document.

In *MAPHIA* and in *Playboy Enterprises, Inc. v. Frena*,[91] bulletin board operators were found liable for allowing users to upload and download copyrighted materials on their systems. In both cases, the defendants knew that the material was being uploaded without the copyright owners' permission. Contributory infringement requires knowledge of the infringing activity. In *Netcom*, the court said that "If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement...but where a BBS operator cannot verify a claim of infringement...the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement..."[92] Of course, documents on the Web are constantly being updated. The author of *A* might link to *B*, and later find that *B* has added unauthorized material. A court would have to decide if it is reasonable to hold the author of *A* liable in this situation.

D. The public performance and public display rights.

1. Direct infringement.

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[91] 839 F. Supp. 1552 (M.D. Fla. 1993).

[92] *Netcom,* 907 F. Supp. at 1374.

The copyright owner has the exclusive right to display or perform her work publicly. According to the 1976 Act:

> To perform or display a work "publicly" means: (1) to perform or display it at a place open to the public...; or (2) to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[93]

A display or performance can occur without a copy of the work being made.[94] Like the distribution right, the performance and display rights are heavily implicated by the transmission of documents on the World Wide Web. On the Web, a work can be displayed or performed or both. For example, a Web site may include text and pictures which are displayed on a monitor, and moving images and audio which are performed. The differences between a display and a performance are inconsequential for the purposes of this discussion.[95]

When viewing *A*, *B* is not being displayed or performed. Therefore, the author of *A* is not directly infringing under clause (1) of the definition. However, the author of *A* may be liable under clause (2), which includes the transmission of a work.

Courts have viewed public displays over the Internet much like a distribution. In *Frena*, the court held that the public display right was implicated as well as the distribution right.[96] The court stated that "The display right precludes *unauthorized* transmission of the display from one place to another, for example, by a computer system."[97] When a user views *B*, a transmission is clearly taking place, but it is the author of *B* who has displayed (or performed) the document by placing it on the server.[98]

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[93] 17 U.S.C. § 101.

[94] This is why commentators have argued that a document in RAM should implicate the display or performance right rather than the reproduction right. *See supra* text accompanying note 65.

[95] The reader should be aware, however, that significant differences do exist. For a thorough discussion of the display and performance rights, see LEAFFER, *supra* note 32, §§ 8.15-8.26.

[96] *Frena,* 839 F. Supp. at 1556. *Accord, Netcom,* 907 F. Supp. 1361 (N.D. Cal. 1995).

Listening to the transmission of an answering machine's outgoing message over a telephone line would also be considered a public performance. If someone lets you use their phone and dials the answering machine for you, they have not violated the performance right. By the same token, *A* is not directly infringing on the display or performance rights.

2. Contributory infringement.

As with contributory infringement of the distribution right, *A* may be liable if it is linked to an unauthorized display or performance.[99] But as long as *B* does not infringe on someone's display or performance right, viewing *B* (and therefore, linking to *B*) does not constitute infringement.

Under the current law, establishing links from *A* to *B* should not be considered copyright infringement. In fact, if the author of *A* wanted to charge users for using her links to *B*, she could. This would be true even if she did not share any of her profits with the author of *B*, and even if the user could access *B* directly for free. But can the author of *A* copyright her links to protect her profits?

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[97] *Frena,* 839 F. Supp. at 1557 (emphasis added) (citing H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess. 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5694.

[98] *See supra* part II.C.1.

[99] *See supra* part II.C.2.

III. Compiling Links For Fun and Profit.

A. Creating copyrightable links.

An author who creates links from *A* to *B* or other Web sites may wish to be compensated for her effort in searching for appropriate documents and establishing the links.[100] For example, there are thousands of Web sites on the Internet and a particular user interested in movies may find only a few of these sites to be of interest. Searching through all the sites, or even using a search program,[101] can be tedious. If there is enough demand, the author of *A* may want to establish links to all the Web sites relevant to movies and then charge users who want to use *A* as a starting point. Can the author of *A* prevent someone else for setting up a competing Web site with its own links to the same movie Web sites?

Because links are facts, they are not copyrightable.[102] However, a compilation of facts (*i.e.* a database) can be copyrighted.[103] "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[104]

The copyright in a compilation extends only to the material contributed by the author, and does not extend to any preexisting material.[105] For example, an anthology of poems is a compilation. The author of the anthology can copyright the arrangement and selection of the poems as well as any original expression that the author adds. But the author cannot copyright the poems themselves. A database is a compilation consisting of noncopyrightable facts. If *A* has links to *B, C, D, et cetera,* then *A* has compiled a database consisting of the URLs for the documents to which it is linked.

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[100] One can hardly avoid the media discussion regarding business ventures on the World Wide Web.

[101] These programs are known as "search engines." The most popular versions include Yahoo! and WebCrawler. The search engines are linked to thousands of Web sites. Currently, users can use most of these search engines for free, but one company is already charging users a monthly fee for access. Coates, *supra* note 27, at 2.

[102] *See supra* notes 37, 49 - 51 and accompanying text.

[103] 17 U.S.C. § 103.

[104] 17 U.S.C. § 101.

[105] 17 U.S.C. § 103.

The leading copyright case involving compilations of facts is *Feist Publications, Inc. v. Rural Telephone Service Co.*[106] In *Feist,* a local telephone company which published its own telephone directory sued a publisher for copying some of its listings. The Supreme Court ruled that factual compilations must entail some originality as to the selection or arrangement of the facts they contain.[107] Indeed, the Court repeated this test throughout its opinion: "[I]f the selection and arrangement are original, these elements of the work are eligible for copyright protection[108]....A factual compilation is eligible for copyright if it features an original selection or arrangement of facts..."[109] The *Feist* Court rejected lower court cases which had held that factual compilations deserved protection because of the effort that went into collecting and compiling the data.[110]

Any expression which the author adds to the facts is, of course, copyrightable: "Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them."[111] So if *A* includes original descriptions of the links, those descriptions are copyrightable. However, that protection would not extend to the links themselves.

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[106] 499 U.S. 340 (1991).
[107] *Id.* at 348-49.
[108] *Id.* at 349.
[109] *Id.* at 350.
[110] This protection of the author's effort was known as the "sweat of the brow" doctrine. *Id.* at 353. In *Feist*, the Supreme Court went to great length in rejecting the "sweat of the brow" doctrine. *Id.* at 351-56.
[111] *Id.* at 348.

The difficult question is what is the requisite level of originality required in the selection and arrangement of the facts. *Feist* states that:

> The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimum degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection *if it features an original selection or arrangement.*[112]
>
> ....
>
> [O]riginality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist.[113]

Feist held that a typical telephone directory white pages, with its selection of basic subscriber information arranged alphabetically, does *not* possess enough creativity to qualify for copyright protection.[114] The *Feist* ruling has been extended by lower courts to business directories as well.[115]

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[112] *Id.* at 348 (emphasis added) (citations omitted).

[113] *Id.* at 362.

[114] *Id.* at 362-64.

[115] ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wisc. 1996) (CD-ROM containing 95 million alphabetized telephone listings is not copyrightable); BellSouth Adv. & Publishing Corp. v. Donnelley Information Publishing, Inc. 999 F.2d 1436 (11th Cir. 1993) (alphabetized business directory for a given geographic area is not copyrightable) *cert. denied,* 114 S. Ct. 943 (1994).

However, in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*,[116] the 2nd Circuit Court of Appeals found that a telephone directory for businesses located in Chinatown, New York was copyrightable. The court defined selection as, "the exercise of judgment in choosing which facts from a given body of data to include in a compilation."[117] Because the publisher chose which businesses to include in its listings and created the categories the businesses would be listed under, the court found that the directory was copyrightable. The *Key* case is important for our discussion because, like most Web pages, it was not a comprehensive listing of all the phone numbers that could have been included in a database.

A should be copyrightable as a compilation unless it contains a link to every Web site relevant to a topic and lists them in alphabetical order. Any expression *A* contains (including descriptions of the Web site each link is connected to) is also protected by copyright. The more difficult question is whether someone else can set up a similar series of links.

B. How thin is thin?

As the *Feist* Court noted, "[C]opyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, *so long as the competing work does not feature the same selection and arrangement.*"[118] Thus, another author is free to use some of the same links as *A*.

In *Key*, the Court of Appeals found that a competing telephone directory did not infringe on Key's copyright--even though they shared many of the same listings--because the competing directory grouped its listings into different categories and not all of the listings were identical.[119] In explaining its ruling, the court wrote:

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[116] 945 F.2d 509 (2d Cir. 1991).
[117] *Id.* at 513.
[118] *Feist*, 444 U.S. at 349 (emphasis added).

> There are a finite number of businesses that are of special interest to a sizable segment of the New York Chinese-American community, and some substantial overlap among classified business directories compiled for that community is inevitable. The key issue is not whether there is overlap or copying but whether the organizing principle guiding the selection of businesses for the two publications is in fact substantially similar...[120]

Under the *Key* analysis, two documents could both be linked to many of the same Web sites as long as the two documents do not share the same selection and arrangement.

While the court acknowledged that within a particular category some listings will overlap, the listings cannot be identical: "If the Galore Directory had exactly duplicated a substantial designated portion of the 1989-90 Key Directory -- for example, all its listings of professionals such as medical doctors, lawyers, accountants, engineers and architects, an infringement action would succeed."[121]

The *Key* court cautions, however, that simply adding or subtracting a single fact (or link) will not prevent a finding of infringement.[122] Similarly, if *A* contains links arranged as the "Top 100 Web sites," *B* cannot avoid infringement by simply using *A*'s selection to create the "Top 50 Web sites." This is exemplified by the *Key* court's reflection on its earlier decision in *Eckes v. Card Prices Update*:[123]

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[119] *Key*, 945 F.2d at 516-17.
[120] *Id.* at 516.
[121] *Id.* at 517.
[122] *Id.* at 514.
[123] 736 F.2d 859 (2d Cir. 1984).

> In that case, we held that a guide to baseball cards infringed a previously published guide, even though the copyrighted guide listed over 18,000 cards and the infringing guide listed only 5000 cards. Essential to our finding of infringement was the fact that the 5000 listings duplicated in the infringing guide were the same 5000 designated as "premium" cards by the copyrighted guide. Id. at 863. The copyrighted guide selected within the 18,000 a designated group of 5000 that it described as "premium" cards. The infringing guide then copied that portion wholesale *based upon the same principle of selection.*[124]

Finally, two documents may be able to share the same links because sometimes there are so few ways of expressing an idea that the idea and its expression merge. To grant copyright to the expression would eliminate the idea/expression distinction which is the foundation of copyright law.[125]

In *Skinder-Strauss Associates v. Massachusetts Continuing Legal Education, Inc.*,[126] two publishers printed competing legal directories for the state of Massachusetts. The district court used the merger doctrine in its analysis, stating: "[T]he merger doctrine applies here because there are so few ways of compiling listings of attorneys. This is because, by definition, any directory of lawyers for a given locale will include virtually the same information."[127] The *Skinder-Strauss* court held that the alphabetical listing of Massachusetts attorneys was not copyrightable, but that other elements of the individual directories and their overall structure were copyrightable.[128] This suggests that, depending on the subject matter, two documents can share identical links but that the second document may infringe the copyright of the first if it copies other elements as well. For example, if *A* and *B* both attempted to create links to all the Web sites that contained information about movies, they might share many of the same links. But *A* might be arranged by movie genres while *B* is arranged by director. A closer case would be if *A* and *B* both created links to all the Academy Award-winning movies. In that case, the merger doctrine might apply.

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[124] *Key,* 945 F.2d at 516-17 (emphasis added).

[125] Often referred to as the "merger doctrine," this concept owes its origin to *Baker v. Selden*, 101 U.S. 99 (1879) (holding that a bookkeeping ledger was not copyrightable). For a discussion of the merger doctrine and its focus on the distinction between patent and copyright law, see LEAFFER, *supra* note 32, at § 2.12 [B][2].

[126] 914 F. Supp 665 (D. Mass. 1995).

[127] *Id.* at 677.

[128] *Id.*

Conclusion

Anyone who has used the World Wide Web knows that links between documents are ubiquitous. Fortunately, copyright law suits involving links are not--yet. To understand the legal implications of links, one must appreciate both the technical processes involved and the current interpretation of copyright law.

Links are like telephone numbers; when a user selects a link, she is calling a computer as if it were an answering machine. When the author of Document *B* puts *B* on a server, it is like placing an outgoing message on an answering machine. Anyone who calls can listen to the message. And just as it is the owner's answering machine that transmits the message to the caller, it is *B*'s server that transmits the document to the user.

If Document *A* contains links to Document *B*, none of *B*'s exclusive rights are being infringed, since *A* simply contains *B*'s "phone number." Even if one accepts the court cases that have held that a document in RAM creates a copy, no rights are being violated. This is because the author of *B* has authorized the distribution and/or display/performance of *B* by placing *B* on a server.

The author of *A* can charge the user for access to *A*'s links to *B* -- even if access to *B* is free. The trade-off is that *A* only enjoys a thin copyright in her selection and arrangement of links. Furthermore, the links themselves are not copyrightable.

All of this is to the public's benefit. That anyone can create or follow a link gives the public the widest possible access to information. The thin copyright offered to *A* encourages the development of useful links since the author of *A* can be compensated for her effort. At the same time, the limited nature of the copyright prevents *A* from creating a monopoly in links and charging exorbitant prices.

So what about the hypothetical situation presented at the beginning of this article? Mary will not have to pay the author of the document she has linked to, but he can reconfigure his document so as to require a password. He would then be able to charge Mary every time someone selects that link. And unless Mary's competitor is using her selection and arrangement to organize his own links, she will not be able to prevent him from competing with her. Which means Mary will have to lower her prices or offer a superior service. Either way, her customers win.

As Congress debates altering the current copyright law, it would do well to note that the phenomenal growth of the Internet is due in large part to the *free* flow of information through the World Wide Web. Authors who place their documents on the Web know full well that others may link to the document and download it for viewing. That is its whole purpose. The information industries now see the Web as a potential marketplace to be exploited. Changing copyright law to suit these *private* industries would significantly alter the development of the Internet as a *public* forum dedicated to the exchange of ideas.

PROTECTING EXPRESSIVE RIGHTS ON SOCIETY'S FRINGE: SOCIAL CHANGE AND GAY AND LESBIAN ACCESS TO FORUMS

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Protecting Expressive Rights on Society's Fringe: Social Change and Gay and Lesbian Access to Forums

> *I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.*
>
> *-- Justice Hugo Black*[1]

In 1940, the U.S. Supreme Court determined that the city of New Haven, Connecticut, could not restrain the speech of Jehovah's Witnesses on city streets "just because it was likely to raise the ire of listeners."[2] In a similar decision in 1992, the Court ruled that local officials were not permitted to have a licensing scheme for parades that allowed them to adjust parade permit fees according to the amount of violence they thought might break out at a given parade (and the resulting amount of security they deemed necessary for public safety). The Court said such decisions required officials to consider the *content* of each parade, rendering the licensing scheme non-content-neutral and thus unconstitutional.[3]

In both of these cases, the U.S. Supreme Court employed some version of public forum and time, place and manner restrictions analysis to disallow the threat of violence as reasonable grounds for censorship of public expression. On the other hand, in 1985, the Supreme Court of Maine upheld a school board decision to cancel activities scheduled for a "Symposium on Tolerance" -- a day-long program of speakers and activities put together by a teacher who was concerned about the recent killing of a gay high school student at his school -- because of the threat of violence. The scheduled speakers hailed from diverse backgrounds -- the physically challenged, the aged, and others, including a lesbian activist. Upon hearing of the scheduled appearance of the lesbian activist, angry and concerned parents called the school to complain. The school board ultimately made the decision to cancel the "Tolerance Day" activities, ironically because of what essentially amounted to intolerance -- threats of violence and bomb scares. The Supreme Court of Maine upheld that decision, partly because the high school was not considered to be a traditional public forum.[4]

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[1] Communist Party v. SACB, 367 U.S. 1, 137, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) (Black, J., dissenting), *quoted in* Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632, 642 (D. R.I. 1976).

[2] Cantwell v. Connecticut, 310 U.S. 147, 164 (1939).

[3] Forsyth County v. Nationalist Movement, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992).

Such themes are rather commonplace in cases involving public forum analysis. The disputes in these cases usually involve groups or individuals who hover tenuously about the margins of society -- the "fringe," the political activists, the outcasts -- those attempting to find their way into the mainstream, those with messages and viewpoints that challenge the mainstream and often need protection from its tyranny. It is therefore reasonable to suggest that the outcomes of cases involving public forum analysis, as well as the reasoning employed within these decisions, are very much affected by the level of social acceptance or social "normalcy" enjoyed by a given group of individuals. For instance, Margaret A. Blanchard points out that Salvation Army was not always the respected charitable organization that it is today. During the nineteenth century, it was considered a "fringe religious group" and its members were not permitted to parade through the streets playing instruments, ostensibly because the racket disturbed both people and horses. Eventually, in 1886, the Salvation Army won a major battle when a Michigan court acknowledged the importance of the public street to a minority group (such as the Salvation Army) attempting to get its message out, to gain support, and to recruit new members. As a result, the court struck down rules that restricted the group's access to public streets. It was one victory that led to many others across the country for the Salvation Army. However, as Blanchard notes, the Salvation Army's fortune did not necessarily rub off on other "socially unacceptable" groups, which continued to have problems with various and subtle forms of censorship.[5]

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[4] Solmitz v. Maine School Administrative District, 495 A.2d 812 (1985), as interpreted by Paul Siegel, *Lesbian and Gay Rights as a Free Speech Issue: A Review of Relevant Caselaw, in* Gay People, Sex, and the Media 213 (1991).

The "Tolerance Day" example cited above suggests that some sort of relationship between social and legal acceptance still exists today. The purpose of this paper will be to find evidence of this connection through an analysis of access-to-forum cases involving gay and lesbian individuals and organizations. A critical review of access to forum cases involving gay and lesbian persons and their concerns may reveal an intimate tie between the relative social acceptance of marginalized groups and their relative success in suing for access to public forums, and may thereby offer some clues about the relationship -- if any -- between societal norms and First Amendment law. The question is this: Can one observe the movement of a marginalized group from social banishment to some level of social acceptance through the arguments and outcomes of legal cases involving access to forums and the concerns of gay men and lesbians? Answering this question will first require an explanation of sociological deviance theory, public forum doctrine, and time, place and manner restrictions, as well as a review of the relevant literature.

Sociological deviance theory and public forum analysis. In fact, deviance, it appears, might be best understood as a process instead of a set of static characteristics. According to sociologists Erdwin Pfuhl and Stuart Henry, it is too simplistic to define deviance as a set of "behaviors and attributes" that people who feel threatened in some way have defined as "problematic."[6] Instead, deviance should actually be defined by way of the "complex social process" that leads to its creation.[7] The idea that something or someone is deviant seems to arise "when people who are in a position to impose their judgments find other people's behavior in one way or another 'unsettling.'"

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[5] Margaret A. Blanchard, Revolutionary Sparks: Freedom of Expression in Modern America 64 (1992).

[6] Erdwin H. Pfuhl and Stuart Henry, The Deviance Process 23 (3d. ed. 1993).

[7] *Id.* at 24.

At some point, those feeling "threatened seek to avoid the persons [they find threatening] and negate the conditions they find objectionable."[8]

It has been suggested in modern discourse on sociological theories of deviance that, generally, marginalized or deviant groups and subcultures will attempt to change the image the public has of them, achieving that alteration "through moral entrepreneurship . . . [exposing] the myths that perpetuate [stigmatized] views."[9] To accomplish this task, groups need to communicate with the public -- either one-on-one, through speeches and rallies, through the production of their own literature and/or newspapers, or by gaining attention in the mainstream media.[10] A particular group's success will depend on several social factors, such as its success in transforming personal troubles into public issues (i.e., the government should stay out of *everyone's* bedrooms, not just those of gay persons); its success in legitimating its members lives (i.e., homosexuality is biological or, at least, not an indication of mental illness); its success in exposing myths and redefining the public's perception of the problem (i.e., gay men are not all pedophiles; gay persons can also become involved in long-term, loving relationships, etc.); its success in promoting the visibility of the oppression of its members (i.e., keeping statistics on hate crimes perpetrated against gay men and lesbians); and its success in altering public policy (i.e., lobbying for the repeal of sodomy laws and fighting back anti-gay initiatives and ordinances).[11]

The effects of a marginalized group moving through this "deviance process" are felt in all aspects of social interaction, including law. Just as when a social movement's "concerns and values" begin to closely approximate those of the "elites" in the mainstream media and politics, "the more likely they are to become incorporated in the prevailing news frames,"[12] so too will laws and judicial reaction to those in that movement begin to change. First of all, at least one U.S. District Court judge has noted that judges "are generally chosen from the mainstream of their communities. They are likely to share many views which are popular with their contemporaries."[13] And in a much larger and historical sense, legal historian Kermit Hall has noted that American legal history

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[8] Edwin M. Schur, The Politics of Deviance: Stigma Contest and the Uses of Power 4 (1980).

[9] *Id.* at 25-29. *See also* Pfuhl and Henry, *supra* note 6, at 220.

[10] Pfuhl and Henry, *supra* note 6, at 222.

[11] *Id.* at 220-221.

> has been one of systematic change, of law and society reacting to and reinforcing one another. . . . Habit and culture incline us to think of the legal system as stable certain, orderly, and fair. Yet our legal history suggests that it has been more a river than a rock, more the product of social change than the molder of social development.

In some sense then, because public forums are often the only forums available to those with unpopular messages, they may form an interesting intersection between law and society, one where sociological theory might be observable in court decisions involving access to public forums.

Early American colonists were quite accustomed to using public forums such as streets, parks and town squares to espouse their views and "win public support for their causes."[14] However, such activities grew disruptive during the abolitionist period and "fell into disfavor."[15] In the late nineteenth century, the public forum began its very slow comeback, recognized in *Hague v. C.I.O.* in 1939,[16] and fully and explicitly endorsed and explicated by the U.S. Supreme Court in 1983.[17] It was not often litigated in the courts until the 1970s.[18]

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[12] Todd Gitlin, The Whole World is Watching, 284 (1980).

[13] South Boston Allied War Veterans Council v. Boston, 875 F. Supp. 891, 913 (D. Mass. 1995).

[14] Blanchard, *supra* note 5, at 64.

[15] *Id.*

[16] 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

[17] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

[18] Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1221 (1984).

Briefly, the Court has decided that all types of government-owned property are not public forums simply by virtue of being owned by the government. Instead, government property falls into three categories: traditional (or quintessential) public forums, designated (or limited) public forums and non-public forums. Traditional public forums include those places historically and "immemorially" used for free expression, such as city streets, parks[19] and town squares. Designated public forums would be those facilities owned by government and opened by the government for expressive activity on the part of citizens. Content-based regulations in both traditional and designated public forums are held to the strict scrutiny standard of review, meaning speech can only be restricted for a compelling state interest, and such restriction must be narrowly drawn. Non-content-based regulation in these forums must fall within acceptable time-place-manner parameters: It must be narrowly tailored, meet a significant government interest, and must not constitute a complete ban on expression.[20]

A non-public forum is government-owned property that has not been opened for "indiscriminate expressive activity by the general public," such as military bases and prisons. Speech may be restricted in these forums based on content, as long as that restriction is "reasonable in light of the purpose of the forum."[21] The restriction of speech in a private forum is left, for the most part, to the owner of the forum.[22]

Public forum doctrine has been the subject of volumes of literature in legal journals. However, with the exception of chapters in media law textbooks and First Amendment treatises, most of the literature dealing with access to public forums is very case-specific.[23] Only a few scholars have discussed, to some extent, the somewhat elusive nexus between gay and lesbian issues and the law of free expression. Kenneth L. Karst, in *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, is an example of the kind of treatment this area of the law usually receives -- cursory and shallow. Karst gives extremely brief attention to the link between gay issues and the continually emerging doctrine of free expression, mentioning access-to-forum issues but not exploring them in any depth.[24] The same is true of an American Law Reports annotation,[25] which focuses primarily on "freedom of association," a right which has been found in the shadows of the First Amendment, and deals only peripherally with the public forum issues involved in the recognition of gay student groups by universities.

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[19] *But see* Clark v. Community for Creative Non-violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984), wherein it was decided an organization could not stage a demonstration concerning the plight of the homeless on the first night of winter by sleeping in tents on Washington Mall in Washington, D.C., on the basis of a National Park Service regulation banning camping on the Mall.

[20] Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment §10.02 [1] at 10-21 - 10-24. *See also* Don R. Pember, Mass Media Law 99-108 (6th ed. 1993).

[21] *Id.*

[22] *See* Pember, *supra* note 20, at 106-108.

Larry W. Yackle gives the very recently contested matter of the participation of gay groups in St. Patrick's Day parades in New York and Boston an exhaustively detailed treatment in *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick.*[26] While only addressing this very narrow aspect of gay and lesbian access to forum issues, Yackle's treatment is very thorough, and raises interesting questions about the rights of political, cultural and intimate association. However, Yackle's investigation ignores the wider range of public forums to which gay men and lesbians have sought access.

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[23] Several articles dealing with public forum analysis more generally include Brian S. Black, *The Public School: Beyond the Fringes of Public Forum Analysis?* 36 Vill. L. Rev. 831 (1991); David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143 (1992); Farber and Nowak, *supra* note 18; and Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. Cin. L. Rev. 739 (1991).

[24] Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95, 117-22 (1990). For further exploration of legal issues involving the concerns of gay men and lesbians generally, *see* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 (1993).

[25] Jean F. Rydstrom. Annotation. *Validity, Under First Amendment and 42 USCS § 1983, of Public College or University's Refusal to Grant Formal Recognition to, or Permit Meetings of, Student Homosexual Organizations on Campus*. 50 A.L.R. Fed. 516 (1980).

[26] Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. Rev. 791 (1993).

Paul Siegel deals with that wider variety of issues -- from parades to phone book advertisements to high school and college newspaper advertisements to subway signs. However, his piece is neither comprehensive nor highly analytical. With precious little analysis, Siegel's goal in his article, *Lesbian and Gay Rights as a Free Speech Issue: A Review of Relevant Caselaw*,[27] is apparently to give the reader a descriptive overview of the many places gay rights cases intersect with issues of free expression -- and not merely in the area of public forum. Siegel also addresses the implications for gay persons of the "freedom of association," "symbolic conduct" and other issues. His is a useful guide to further research and several rather obscure sources, but again, is merely descriptive.

Though none of them mention any parallels to lesbian and gay concerns, several other articles deal with situations one might see as analogous to that of lesbians and gay men. For instance, there were the free speech rights won and lost by groups such as the Nazis in Skokie, Ill.;[28] the communists during the Red Scare;[29] African American civil rights marchers in the 1960s;[30] feminists;[31] and, more recently, religious groups such as anti-abortion protesters and those lobbying for prayer in public schools.[32] However, these analyses tend to be very case-specific and none of them has employed a sociological framework to analyze what has happened to these other marginalized groups.

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[27] Siegel, *supra* note 4.

[28] *See, e.g.*, Donald Alexander Downs, Nazis in Skokie: Freedom, Community, and the First Amendment (1985).

[29] *See, e.g.*, Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 San Diego L. Rev. 1 (1991).

[30] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 Yale L.J. 1411 (1995).

[31] *See, e.g.*, Justene M. Adamec, *Defining the Limited Public Forum in California:* Women's International League for Peace and Freedom v. City of Fresno, 17 Sw. U. L. Rev. 287 (1987).

[32] *See, e.g.*, Susan Ehrmann, Lamb's Chapel v. Center Moriches Union Free School District: *Creating Greater Protection for Religious Speech through the Illusion of Public Forum Analysis*, 1994 Wis. L. Rev. 965 (1994); Paul Horwitz, *Anti-Abortion Protests and the Public Forum:* Ontario (Attorney General) v. Dieleman, 17 Advoc. Q. 466 (1995); and Rosemary C. Salomone, *From* Widmar *to* Mergens*: The Winding Road of First Amendment Analysis*, 18 Hastings Const. L.Q. 295 (1991).

Analysis of Cases

This paper utilizes a traditional qualitative analysis of access to public forum cases involving gay men, lesbians and organizations concerned with lesbian and gay issues. Citations for these cases have been gleaned from the few works that have addressed gay and lesbian access to forum issues, as well as from the footnotes of the cases themselves, through Shepardizing, and through a limited LEXIS search to acquire the most recent or as-yet unreported cases. A total of 41 decisions were found for inclusion in this study.

The earliest case found for inclusion in this analysis was a California Public Utilities Commission decision from 1969. The number of cases has grown somewhat steadily over the past 27 years, with eight cases in the '70s, 12 cases during the '80s, and at least 16 cases so far in the '90s. While the decisions have become more numerous, so have defeats for litigants representing gay and lesbian concerns. Whereas seven of the 11 decisions handed down prior to 1985 were decided in favor of gay and lesbian groups seeking access to some kind of forum, only three of the 26 decisions since then have gone in their favor, beginning with five denials of access in 1985 alone. A closer examination of the cases reveals, however, some interesting links between social mores and decisions in access to forum cases involving gay men and lesbians that are worthy of more detailed exploration.

Claims in this area have fallen into four categories: 1) cases in which a homosexual or homophile organization (hereinafter loosely referred to as "gay group") attempts to gain access to a particular forum (be it eventually determined public or private); 2) cases in which a gay group attempts to gain some sort of recognition from a state entity that *brings with it* access to a particular forum or forums; 3) cases in which a non-gay or anti-gay organization attempts to block access to a particular forum by a gay group; and 4) cases in which a gay group attempts to block access to a forum by some other, non-gay or anti-gay organization.[33] The vast majority of the decisions analyzed for this study fall into the first of these categories. A small minority are distributed amongst the other three.

It is most useful, therefore, to examine the cases in terms of the time period in which they occurred. As noted above, although most of the decisions analyzed in this study were handed down since 1985, the majority of the decisions handed down prior to 1985 resulted in protection of the expressive rights of the gay groups involved. Decisions handed down during and after 1985 have largely gone against them.

It is worth noting before beginning the analysis that the terms "homophobia" and "homophobic" are used in the following analysis to describe the behavior (or attitudes attending such behavior) of taking action against (or denying access to) gay groups simply and/or fundamentally because one disagrees with, is uncomfortable with, or is morally outraged by homosexuality -- either homosexual conduct and/or simply the idea of being homosexual or living what many refer to nebulously as "the homosexual lifestyle."

Decisions prior to 1985. Early cases involving access of gay groups to public forums commonly discussed the First Amendment rights of gay persons very favorably. With the exception of the two earliest cases -- both California Public Utilities Commission decisions in 1969 and 1970 involving rather blatant homophobia[34] -- decisions usually portrayed gay men and lesbians as underdogs, representing a minority interest that needed protection in the face of the tyranny of some "majority" or "traditional" voice. Very frequently, the majority opinion noted the homophobia or hypocrisy of those attempting to restrict the First Amendment speech and associational rights of lesbians and gay men.

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[33] There is also a body of related cases wherein students have asked for funding or merely endorsement by their university, without mention of any attending privileges, such as access to university facilities or mailing services. These cases are not entirely on-point for this study and therefore will not be discussed here. *See, for example,* Gay and Lesbian Students Association v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987), *rev'd,* 850 F.2d 361 (8th Cir. 1988); Gay Activists Alliance v. Board. of Regents of the University of Oklahoma, 638 P.2d 1116 (1981); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978); and Student Services for Lesbians/Gays and Friends v. Texas Tech University, 635 F. Supp. 776 (N.D. Tex. 1986).

[34] Council on Religion and the Homosexual Inc. v. P.T.& T. Co., 70 P.U.C. 471 (Cal. 1969) and Society for Individual Rights Inc. v. P.T.& T. Co., 71 P.U.C. 622 (Cal. 1970). Commissioner J.P. Vukasin Jr.'s concurring opinion in *Council on Religion* is a clear example of the homophobia referred to here. Referring to homosexuals as "victims of moral aberration" and "perverts," Vukasin said it would be "highly improper" for the Commission to require P.T.& T. to permit several organizations (including the Council on Religion and the Homosexual, Society for Individual Rights Inc., Tavern Guild of San Francisco Inc. and Daughters of Bilitis Inc.) to advertise in its San Francisco Directory under the heading "Homophile Organizations, . . . charged, as it [the Commission] is, with the responsibility of protecting the public interest." He added that "[t]he disorders of drug addiction, alcoholism, and homosexuality cannot be corrected by encouraging those afflicted to further persevere in such behavior. Additional immersion will only bring about emotional destruction to the unfortunates involved." In both of these decisions, dissenting

For instance, when the Alaska Gay Coalition sought to be listed in the 1976-77 *Anchorage Blue Book*, a paperback guide to services and organizations in the greater Anchorage area, Alaska Supreme Court Justice Burke noted that the mayor admitted in his testimony that part of the reason he denied the group access to the book was his "personal aversion to homosexuality."[35] Burke went on to note that it was "apparent that the Gay Coalition was deleted from the *Blue Book* solely because it was a homosexual organization," and not for any other reason.

In *Gay Students Organization of the University of New Hampshire v. Bonner* in 1974, Chief Judge Coffin, writing for the First Circuit U.S. Court of Appeals, observed that the "underlying question" was whether "group activity promoting values so far beyond the pale of the wider community's values is also beyond the boundaries of the First Amendment."[36] He concluded that, at least in the case of a student group attempting to gain recognition by a university and access to its facilities, such a group's expression clearly fell within the boundaries of First Amendment protection.

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opinions by Commissioners A.W. Gatov and Thomas Moran mocked the majority opinion by revealing its faulty reasoning and duplicity. Gatov even called the decision in *Council on Religion* a "travesty," and Moran said the decision was clearly discrimination "against a substantial segment of the population because it holds unpopular views." Incidentally, gay groups did not fare any better in a more recent "Yellow Pages" case. While garnering some staunch support in dissenting opinions, gay groups have not yet won such a case. The questions of First Amendment protection and public forum access did not arise in these cases. Instead, discussion centered on the offensiveness of permitting Yellow Pages advertisements to include words like "lesbian" and "gay." For example, in *Loring v. BellSouth Advertising and Publishing Corp.* (339 S.E.2d 372, 374, 117 Ga.App. 307 [1985]), BellSouth Advertising & Publishing Corp. was permitted by the Georgia Court of Appeals to refuse an ad on this basis, even though BellSouth admitted that, during the three years in which it had already run the ad in its Yellow Pages, "not one complaint from the public or a customer [had] been received."

[35] Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 955 (1978).

[36] 509 F.2d 652, 658 (1st Cir. 1974).

And in *Wood v. Davison*, the U.S. District Court for the Northern District of Georgia decided that administrative officials at the University of Georgia infringed gay students' First Amendment rights of speech, assembly and association when they denied the Committee on Gay Education access to university facilities. The court specifically noted that "it is not the prerogative of college officials to impose their own preconceived notions and ideals on the campus by choosing among proposed organizations, providing access to some and denying a forum to those with which they do not agree."[37]

Decisions since 1985. More recent cases, however, offer more mixed views of the First Amendment rights of lesbians and gay men, frequently discussing them in tandem with the First Amendment rights of whatever group was opposing their interest in a particular suit, thereby weighing them against more established and traditional viewpoints. In one of the 1992 St. Patrick's Day parade decisions in New York City, the Irish Lesbian and Gay Organization (ILGO) sought an injunction against the parade organizers' failure to grant its members permission to march in the St. Patrick's Day parade. If granted, the injunction would have permitted the gay group to march under its own banners in the annual parade. The U.S. District Court for the Southern District of New York refused to grant the injunction. While the court explicitly recognized that ILGO would "suffer irreparable harm through exclusion from the parade," it also noted that granting the injunction "would cause harm of similar order" to the parade organizers, who argued that their First Amendment right to free expression and association "entitle[d] them to conduct a parade that vindicates their loyalty, respect and deference to the beliefs taught by the Roman Catholic Church."[38] Since the gay group, therefore, could not show "a balance of hardships 'decidedly'" in its favor, it lost the case.[39]

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[37] 351 F. Supp. 543, 549 (1972). *See also* Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632, 637 n.6 (1976) (deciding that asserting that "certain practices advocated by the 'Gay Movement' 'are of questionable legality' " was "clearly an impermissible basis" for denying a gay group access to a public forum); Catholic War Veterans of the United States v. City of New York, 576 F. Supp. 71, 74 (1983) (observing that, in asserting their First Amendment freedom to practice a religion of their choice to argue that a gay group should no longer be able to march by a Catholic cathedral, plaintiff religious groups actually were "assuming a right to be protected from speech and expression with which they disagree); and Gay Student Services v. Texas A&M University, 737 F.2d 1317, 1330 (1984) (determining that resting a decision not to recognize a gay group on the argument that doing so would "encourage more homosexual conduct, resulting in an increase in the number of persons with . . . psychological and physiological problems" was evidence of " 'undifferentiated fear or apprehension' that . . . 'is not enough to overcome the right to freedom of expression.' ").

An unfortunate side-effect of this framing is that gay groups tend to end up looking like the unruly rabble in such portrayals, setting up their *opponents* for the public sympathy the gay groups sought to acquire in the first place by gaining access to a forum in which to present their perspective. In fact, not since 1983 have the First Amendment rights of a gay group seeking access to a public forum prevailed in a decision in which the gay group's First Amendment rights were explicitly matched up against its opponents' First Amendment rights. And that 1983 decision is the only such decision that resulted in a victory for the gay group involved in the litigation.[40]

This phenomenon manifested itself as a simple directing of animosity toward the gay group involved (as opposed to a transfer of sympathy from the gay group to its opponents) in a series of decisions in the *Olivieri v. Ward* case in the mid-1980s. Since at

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[38] The Irish Lesbian and Gay Organization v. New York State Board of Ancient Order of Hibernians, 788 F. Supp. 172, 179 (S.D.N.Y. 1992).

[39] *Id. See also* Gay Veterans Association Inc. v. American Legion, 621 F. Supp. 1510, 1518 (D.C.N.Y. 1985) (deciding in favor of the American Legion after noting that "in the absence of a showing of state action, the First Amendment rights of the American Legion defendants must also be considered"); and Sinn v. Daily Nebraskan, 638 F. Supp. 143, 152 (D.Neb. 1986) (noting, not surprisingly, that the refusal of a college newspaper to print the sexual orientation of a "would-be roommate advertiser" was a "constitutionally protected editorial decision in nowise diminished by state support or subsidization" of the newspaper).

[40] Catholic War Veterans of the United States Inc. v. City of New York, 576 F. Supp. 71 (S.D.N.Y. 1983). This case was the first case in the continuing battles between gay groups and groups that do not want to see them march past St. Patrick's Cathedral during the annual gay pride parade. In this case, the Catholic War Veterans of the United States Inc., the Rabbinical Alliance of America Inc. and Citizens Against Sacrilege in the Media Inc. sought primarily to enjoin the 1983 gay pride parade entirely or, alternatively, to have it rerouted so that it no longer passed by St. Patrick's Cathedral. The U.S. District Court for the Southern District of New York said the plaintiffs were not entitled to such relief, in spite of their assertion that they had a right to be spared the insulting speech of the gay and lesbian marchers based on their religious affiliations as Catholics and Jews. Relatedly, gay groups have repeatedly demanded the right to march in the St. Patrick's Day parade because they are proud of both their Irish heritage and their homosexual orientation, while organizers of the St. Patrick's Day parade have maintained that gay groups cannot march with them because homosexuality runs counter to the teachings of the Catholic Church, which parade organizers have sworn to uphold. For a thorough review of the history of the conflict concerning the St. Patrick's Day parades in New York City and Boston, *see* Yackle, *supra* note 26.

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least 1976, the annual Gay Pride parade, like many major parades in New York City, has run down Fifth Avenue, along which is located St. Patrick's Cathedral. The parade has been held annually since 1970, the year after the Stonewall Inn riots, to celebrate the liberation of Christopher Street (address of the Stonewall) and, symbolically, the liberation of gay men and lesbians everywhere. St. Patrick's Cathedral, located as it is along the parade route, and representing as it does the conservative and anti-homosexual views of the Roman Catholic Church, annually had been the site of peaceful demonstration by the Catholic gay group Dignity. The group had always conducted a prayer service for the duration of the Pride parade, singing hymns and "conveying symbolically its love for the Church and . . . its conviction that God's love and understanding extends to all people, regardless of their sexual orientation, and . . . that the Church is the people of God, rather than its mere institutions, buildings and leaders."[41] All such demonstrations had been completely peaceful and without incident until 1981, when two men (who eventually formed what they called the Committee for the Defense of St. Patrick's) were arrested for assaulting the demonstrators and interfering with their activities. Thus began a drawn-out legal battle over which groups had the right to demonstrate where and when, and what limits police could reasonably impose on such demonstrations and the frequently attendant violent outbursts.

However, this extensive history was detailed only in the *second* decision in the *Olivieri* case, handed down by the U.S. District Court for the Southern District of New York in 1986. In the first reported decision, handed down by the U.S. Court of Appeals for the Second Circuit in 1986, the court simply accepted, without scrutiny, the New York City Police Department's claim that it did not have "sufficient resources to control what -- in New York City Police Commissioner Ward's opinion -- is a reasonable risk of a riot on Fifth Avenue."[42] This first *Olivieri* opinion was very conciliatory to the police department

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[41] Olivieri v. Ward, 637 F. Supp. 851, 854-855 (S.D.N.Y. 1986).

[42] Olivieri v. Ward, 766 F.2d 690, 692 (2d Cir. 1985).

(and backed its decision to "freeze," or bar access to, the sidewalk in front of St. Patrick's for the duration of the parade) and gave the distinct impression that Dignity was to blame for the disruption. The court was reluctant to go against the wishes of the police department and insist it find a way to control the volatile situation "while permitting the very Dignity demonstration that threatens the ability of the police to maintain control of the situation."[43] After the U.S. District Court's extensive recount of the history of the demonstrations, the Second Circuit Court of Appeals reconsidered (in the third *Olivieri* decision), noting that wherever First Amendment rights are concerned, "a court must independently determine the rationality of the government interest implicated and whether the restrictions imposed are narrowly drawn to further that interest," and ruled that restrictions imposed on demonstrators by the New York City Police Department "were not drawn solely to further the government's conceded interest in public safety."[44] In the end, a unique compromise was reached whereby the free speech rights of both groups were restricted (and protected) to some extent. The police were to allow no more than 25 members of one group to stage a protest on the sidewalk in front of the cathedral for 30 minutes, followed by 30 minutes of totally restricted access to the sidewalk, and then 30 minutes of demonstration by no more than 25 members of the other group.

Possible reasons for the change in decisions. The contrast between early and more recent decisions involving gay group access to particular forums may indicate a trend toward restricting access to forums for lesbians and gay men. More likely, however, it is mostly a reflection of the kinds of cases brought early on and those brought more recently. Earlier cases tended to involve attempts by gay and lesbian student groups to gain access to campus facilities. Decisions tended, at least on appeal, if not also at the trial level, to go in the students' favor. This is hardly surprising in light of the climate of student political protest that existed on college campuses in the 1970s and the increasing tendency of universities to relinquish the "role of *parens patriae* of their students which they formerly occupied,"[45] at least partially because it became apparent after the U.S. Supreme Court's opinion in *Healy v. James*[46] that "constitutional restraints on authority apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks."[47]

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[43] *Id.* at 694.

[44] Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986).

In addition, earlier cases tended to discuss the social aspects of the issues more than more recent decisions have. Doing so almost inevitably involved a recognition of "the tension between deeply felt, conflicting values or moral judgments" and a concomitant recognition that, for every minority group "there are sectors of the community to whom its values are anathema."[48] There was also a recognition of the notion that University administrators "have the unenviable task of trying to maintain a precarious balance between the rights of members of the academic community and the wishes of the taxpayers and alumni who support that community."[49] For some reason, such realizations led to a careful and deliberate balancing and, more often than not, to a conclusion that merely finding a particular group's communication "shocking and offensive" is not grounds enough to censor that communication.[50]

Oddly, the earlier cases also discussed the issue of whether a meeting of a group of gay persons constituted or would inevitably lead to "illegal activities" more frequently than the more recent decisions (partly because, one might suppose, many sodomy laws have since been repealed or declared unconstitutional). It might be suspected that such discussion would almost automatically lead to a knee-jerk restriction of access to forums for gay groups. While it did occasionally lead to such reactions at the administrative or trial levels (e.g., while student organization approval committees frequently approved recognition of gay groups, deans of student affairs would just as frequently snatch such recognition away before benefits could be realized[51]), such restriction was almost always overturned at the appellate level. One judge even saw fit to make light of the illegal conduct issue. When a gay group sought recognition and endorsement by the Rhode Island Bicentennial Commission in 1976 (and thereby, access to the "Old State House" for its public educational meeting), a U.S. District Court judge mused at "the irony" of the Bicentennial Commission's reluctance to permit the gay group to use the Old State House "because they might advocate conduct which is illegal. Does the Bicentennial Commission need reminding that, from the perspective of British loyalists, the Bicentennial celebrates one of history's greatest illegal events?"[52]

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[45] Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (1976).

[46] 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). In this case, the University of Connecticut had denied official university recognition to the Students for a Democratic Society (SDS). In relevant part, the Court held that the denial of access to university facilities was the primary means by which the university had infringed the expressive rights of members of the SDS organization.

[47] Wood v. Davison, 351 F. Supp. 543, 546 (1972).

[48] *Gay Students Organization*, 509 F.2d at 658.

[49] *Wood*, 351 F. Supp. at 548-549.

[50] *Gay Students Organization*, 509 F.2d at 661.

More recent cases have tended to involve more "hot-button," highly emotionally charged issues (including gay involvement in parades closely tied to Catholic doctrine, such as the St. Patrick's Day Parades, or military service, such as Veteran's Day parades), perhaps because of the growing strength and/or proliferation of the gay liberation movement itself or an increase in the visibility of gay men and lesbians and an accompanying appreciation for the diversity within this group (i.e., that there are gay Catholics and retired gay veterans). A good number of these decisions have centered around the St. Patrick's Day parade controversies in Boston and New York. The city of New York was referred to in one of the *Olivieri v. Ward* decisions as "a great and pluralistic city that has long flourished as one of the nation's most fertile seedbeds for new and often disturbing ideas."[53] But how pluralistic the city needs to be and whose ideas are more disturbing are often perplexing questions in this litigation. The conflicts in these cases have pitted First Amendment rights of free speech and association against each other and against civil rights ordinances designed to protect minority groups from discrimination.

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[51] *See, e.g.*, Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C.App. 1987) and *Gay Lib.*, 558 F.2d 848 (1977).

[52] *Toward a Gayer Bicentennial Committee*, 417 F. Supp. at 642.

One difficulty in these cases is deciding which group is actually the oppressed minority. In the U.S. Supreme Court's decision in *Hurley v. Irish-American Gay Group of Boston*, Justice Souter rested the Court's decision on the protection of free speech, noting that "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."[54] The "private speaker" he referred to was the St. Patrick's Day parade organizing body; the message "more acceptable to others" was presumably one that included the voice of gay Americans of Irish heritage. This is quite a switch from the traditional way of interpreting these cases, wherein the message that is most acceptable to others usually does not include the voices of gay people. The latest 1996 decision concerning the New York St. Patrick's Day controversy is more along the lines of what one might expect to see in these cases. In this case, Judge John G. Koeltl wrote, "It is undisputed that ILGO's members have a First Amendment right to celebrate their Irish heritage and their pride in their sexual orientation as well as their moral outrage at their exclusion from the St. Patrick's Day Parade."[55]

The emotional charge involved also leads to accusations of homophobia on the part of police by the gay groups involved. The courts have sometimes found no basis for such claims, as in the 1995 case of *Irish Lesbian and Gay Organization v. Bratton*,[56] and other times have found substantial proof of such allegations, as in the 1986 case of *Olivieri v. Ward*.[57] In the 1994 case of *Irish-American Gay Group v. Boston*, the high court of Massachusetts determined that, after refusing to permit the gay group to march in its parade, the St. Patrick's Day Parade organizers could not then "cloak their discriminatory acts in the mantle of the First Amendment."[58]

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[53] *Olivieri*, 673 F. Supp. at 873.

[54] 115 S.Ct. 2338, 2351 (1995).

[55] Irish Lesbian and Gay Organization v. Giuliani, No. 96 Civ. 1398 (JGK), 1996 U.S. Dist. LEXIS 3108, at *24-25 (S.D.N.Y. March 14, 1996).

Discussion and Conclusions

If there is a trend in cases involving gay groups and access to public forums, it may be in the direction of less access and greater restrictions on free expression for lesbians and gay men. However, the meaning of this trend is not so easily apprehended. It does not necessarily imply a lessening of First Amendment freedom for lesbians and gay men, for a review of the *types* of cases brought and the nature of the issues they have raised reveals a change in the very nature of claims brought in this area of the law. Not unimportant is the climate on college campuses in the '70s, as litigation brought by gay groups to gain access was dominated by student groups during this period. As rules at universities began to loosen up and the old reliance on *en loco parentis* began to fade, cases brought by gay groups attempting to gain access to university facilities dwindled (possibly because access was more and more routinely granted without the need for litigation).

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[56] "As to plaintiff's claim of pretext and homophobia, the Court finds no evidence of political concern, bias or content-based motivation by the defendants collectively, or any one of them, in denying ILGO's application." 882 F. Supp. 315, 319 (S.D.N.Y. 1995).

[57] The U.S. District Court in this case pointed out that "certain excessive sensitivity to the Catholic Church on the part of police officials" supported its assessment that the police restriction on free expression was not content neutral. It noted that "historical evidence of police sympathy with the Church is evidenced in particular by the secret meeting with Church officials in 1983 and the peculiar language of the memo it spawned which, indeed, reads as if the police were responding to a Church request and planned to offer *post facto* public safety rationales to the world at large." *Olivieri*, 673 F. Supp. at 876.

[58] 636 N.E.2d 1293, 1300, 418 Mass. 238 (1994).

The recent slew of cases in which gay groups request access to certain parades (of whose social make-up they see themselves as a subgroup) is indicative of continuing gay liberationist struggles to achieve recognition and acceptance as normal, diverse and rooted in some sort of tradition or history of their own. The difference is that, instead of attempting to gain access, as they did in the '70s, to a forum in which they were welcomed or at least tolerated by fellow students (because of a relative unintrusiveness), gay groups are now attempting to gain access to forums in which they are completely unwelcome and extremely intrusive (having dared to tread on deeply rooted moral traditions).

There is, in fact, some indication in court decisions of the change in social attitudes toward gay men and lesbians. The courts opened doors where it was socially acceptable to do so (as evidenced by the fact that student organization committees accepted gay groups before upper-level, conservative administrators were willing to do so), and is currently closing them where it is socially acceptable to do so. The unexpected finding here is that, instead of observing the movement of gay men and lesbians "from social banishment to some level of social acceptance," one can only make the observation that gay men and lesbians have moved from one level of social acceptance to some other level of social banishment. This new level of exclusion, however, is not in the same forum or context as the previous level of social acceptance. One could say that the old level of social acceptance (in the 1970s) was to be found where gay groups attempted to gain access to morally neutral forums in very non-threatening ways that most people could ignore or tolerate, and the new level of social exclusion is to be found where gay groups have attempted to gain access to forums that carry substantial moral meaning, an effort many people find both threatening and offensive. That gay groups have not found social acceptance at this new level does not preclude them from ever finding acceptance there; it does, however, preclude them from winning court cases in this new forum, perhaps only until they do find acceptance there.

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THE VARIABLE NATURE OF DEFAMATION: SOCIAL MORES AND ACCUSATIONS OF HOMOSEXUALITY

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The Variable Nature of Defamation: Social Mores and Accusations of Homosexuality

The generally accepted definition of defamation is a fairly straight-forward one: defamatory statements are those statements tending to "expose another to hatred, ridicule or contempt."[1] The plaintiff must prove "the community in which publication occurred, in fact, deemed the statement . . . sufficiently authoritative and disparaging to warrant their lowered esteem for the plaintiff."[2] As must be obvious from this definition, what is considered defamatory is inexorably tied to the community and there would seem to be an intimate intertwining of social standards and the meaning of defamation.

Because defamation is tied so closely to societal norms and mores,[3] its meaning may be quite fluid, changing with the times and, one might suppose, the characteristics of the community in which any given case is litigated. There are examples of such change in cases involving accusations of communist sympathies[4] and in cases involving false accusations concerning skin color.[5]

An interesting and timely illustration of this interdependency of legal interpretation and social norms involves allegedly false accusations homosexuality and bisexuality. At least 52 such cases have been litigated -- 18 at the appellate level in the last decade alone.

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[1] Restatement (Second) of Torts § 559 cmt. b (1977). *See also* the oft-cited Kimmerle v. New York Evening Journal Inc., 262 N.Y. 99, 186 N.E. 217, 218 (1933).

[2] *Kimmerle*, 186 N.E. 217 (1933).

[3] A "norm" is defined as: "a standard of conduct that should or must be followed" or "a way of behaving typical of a certain group." The term "mores" is commonly defined as: "folkways that are considered conducive to the welfare of society and so, through general observance, develop the force of law, often becoming part of the formal legal code." *See* Webster's New World Dictionary 970 and 926 (2d college ed. 1986).

[4] Garriga v. Richfield, 174 Misc. 315 (1936), in which an accusation of communist advocacy was considered not to be libelous; Levy v. Gelber, 175 Misc. 746 (1941), in which it was determined an accusation of Communist Party involvement was libelous; and Boudin v. Tishman, 264 App.Div. 842 (1943), in which, again, it was decided an accusation of communist involvement was libelous.

[5] Natchez Times Publishing Co. v. Dunigan, 221 Miss. 320, 72 So.2d 681 (1954), in which a white man was falsely identified as a "Negro" and won a libel judgment because many people, at the time, associated color with character. One might argue no cause of action would hold in the same case today.

Negative attitudes toward homosexual orientation (mostly arising from the notion that homosexual activity is illegal and/or immoral) have varied not only over time, but also between different locations (some regions of the country have earned a reputation for being more tolerant than others) and among various sizes and types of communities (e.g., rural areas have commonly tended to be less tolerant of such deviation from the norm than big cities with their more diverse mix of inhabitants).

A temporal shift in attitudes can be tracked somewhat with opinion polls. For instance, a 1970 Harris Poll asked 3,949 American adults whether they felt "homosexuals" were "more helpful or more harmful to American life, of whether you think they don't help or harm things much one way or the other." Only 2 percent felt gay persons were helpful to American life, while 54 percent felt they were more harmful to American life, and 33 percent said they neither helped or harmed. Five years later, 1 percent said gay persons were helpful to American life, but only 40 percent said they were more harmful to American life. Nearly 50 percent said it didn't matter one way or the other.

In what would appear to be a continuation of this trend, 72 percent of those responding to a 1978 Harris poll said they believed "homosexual relations in private between consenting adults" was an activity that should be left to the individual instead of being regulated by law. Only 19 percent felt such activity ought to be totally forbidden by law. On the other hand, a 1990 Harris poll posing the same question found perhaps a slight shift in opinion in the other direction, 67 percent responding such activity ought to be left to the individual and 24 percent saying it ought to be totally forbidden by law. But perhaps this is merely an indication of the currently volatile nature of opinions regarding homosexuality. In a 1992 Harris poll that asked respondents whether George Bush or Bill Clinton had the better policies regarding "gay rights and law to prohibit discrimination against gays and lesbians," 45 percent chose the more liberal, gay-tolerant policies of Clinton while 30 percent chose Bush's policies.

It is possible that shifts in public opinion about homosexuality might be reflected in court decisions in cases arising from allegedly false accusations of homosexuality and bisexuality. If so, this would illustrate the interdependence of social norms and the interpretation of the definition of defamation. The purpose of this paper, then, is to explore the possibly fluid and variable nature of defamation via the example of actions arising from accusations of non-heterosexual orientation.

Literature Review

The investigation in this paper implies the intersection of at least two distinct fields in the study of law: the law of defamation and the law associated with gay and lesbian issues. As the former is the primary focus of this paper, it will be addressed in greater depth than the latter. To allow a better understanding of the various issues that arise in litigation concerning accusations of homosexuality, a very basic and simplified account of the literature concerning the historical development of defamation law will be presented first, including a look at literature describing the reliance of defamation law on society and vice versa. The pertinent literature from lesbian and gay legal studies will be addressed at the end of the literature review, concluding with a study by Randy M. Fogle that addresses the question of whether it is defamatory to call someone gay and explores ways to assist courts in making such determinations.

Historical development and social aspects of defamation. The individual's reputation has had social value as long as societies have existed; over time, it also has acquired moral and legally enforceable value, as well. The Bible said that "a good name is to be sought above all else," and William Shakespeare, in the tragedy "Othello," wrote that "he that filches from me my good name/Robs me of that which not enriches him,/And makes me poor indeed."[6] Early English ecclesiastical courts believed defamation was a sin, but the state entered the picture when it was feared citizens would surely take the law into their own hands to defend their tarnished honor.[7]

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[6] Both as quoted in William B. Spong, Jr., *Defamation and the First Amendment: New Perspectives*, 25 Wm. & Mary L. Rev. 743, 744 (1983-84).

From the beginning of defamation law, the courts relied heavily on social norms in determining what was to be considered defamatory. Instead of attempting to define "reputation" in the abstract, the courts "have inquired whether such statements would be likely to elicit certain specific responses from those to whom the statements were published."[8] In a sense, the courts have used society as a kind of mirror, observing personal reputation and dignity only by way of their reflection in the reactions of reasonable persons within the community. While the determination of what is defamatory and what is not may change along with those reasonable persons, the definition of defamation has remained constant since at least the 1933 case of *Kimmerle v. New York Evening Journal Inc.*[9] A defamatory statement, it was determined, is one "tending to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace."[10]

Yet part of what is notable in the historical development of defamation is not only the remarkable stability of its definition, but also the remarkable *instability* of its *interpretation*. For instance Judge Learned Hand stated in *Grant v. Reader's Digest*[11] that, judging from opinions handed down in New York, it seemed to be a condition that an allegedly defamatory statement must arouse "hatred, contempt, scorn, obloquy or shame" from "'right-thinking' people" to be actionable. Even so, he went on to say, it has been decided that the "imputation of extreme poverty might be actionable, although certainly 'right-thinking' people ought not shun, despise or otherwise condemn one because he is poor . . . . It is enough there be some, as there certainly are, who would feel [it was disgraceful to be an agent for the Communist Party], even though they would be 'wrong-thinking' people if they did."[12] Even acknowledging the more considered position that it was not an inherently bad thing to be a communist, Hand had to acknowledge that many would feel it *was* a bad thing. Some 15 years earlier, this was not necessarily true.[13] Nor was it necessarily true nearly 30 years later.[14] Yet strictly because of social mores at the time, Hand felt compelled to decide that an accusation of communist involvement was, in fact, defamatory.

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[7] *Developments in the Law: Defamation*, 69 Harv. L. Rev. 875, 877 (1956).

[8] *Id.*

[9] 186 N.E. 217 (1933).

[10] *Id.*

[11] 148 F.2d 462, 465 (2d Cir. 1945).

The editors of *Harvard Law Review* in 1956 offered another definition of what it means to be defamed, one that perhaps more clearly reveals the connection between defamation and community standards. A statement is defamatory, they wrote, "if it tends to expose the plaintiff to 'contempt, aversion, disgrace, or induce an evil opinion of him or deprive him of friendly intercourse in society.'"[15] As already discussed, this rather blatant appeal to social mores is no accident; in a very practical sense, it is the only measure by which courts can interpret defamation.

A 1989 *California Law Review* article critically explored the complex relationship between the individual and the society in which he or she lives. It noted that communities large and small, north and south differ in what they require from their members in the way of "civility, decency, and morality . . . . Together such norms will constitute the practices and the way of life that make each community the distinctive social entity that it is."[16]

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[12] *Id.* at 466-467.

[13] *See, e.g.*, Hays v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929), wherein it was decided a pamphlet entitled "LaFollette-Socialism-Communism" was held to be not libelous even though the plaintiff had been accused of "advocating, promoting and inciting revolt" against various government institutions, and thereby with "fostering communism."

[14] *See, e.g.*, Raible v. Newsweek Inc., 341 F.Supp. 804 (W.D. Pa. 1972), wherein it was noted that calling someone a "Red" or a "Pinko" will not always give rise to a cause of action for libel.

[15] *Developments in the Law: Defamation, supra* note 7.

[16] Jeremy Waldron, *Particular Values and Critical Morality*, 77 Calif. L. Rev. 561, 574 (1989).

Arguably, one's sense of dignity and self-respect often arise from whether one is accepted and appreciated within one's community. And the community as a whole ceases to be a community when its members cease to seek such approval and affirmation from their peers. Therefore, as noted by Prof. Robert Post in his *Social Foundations of Defamation Law*, not only does defamation law protect an individual's sense of self-worth and dignity, but also the "enforcement of society's interest in its rules of civility, . . . its interest in defining and maintaining the contours of its own social constitution."[17] In this way, defamation and societal mores become profoundly and fundamentally intertwined.

Because of the interdependence of societal mores and defamation -- and especially, for the purposes of this paper, the reliance of the latter upon the former -- it would be logical to assume that cases discussing the defamatory or non-defamatory nature of an accusation of homosexuality might change over time, both in terms of their outcomes and their reasoning.[18]

Lesbian and gay legal studies. Most of the recent legal research on issues of concern to lesbians and gay men, as well as to bisexual, transsexual and transgendered persons,[19] has focused on the various legal aspects of the gay rights struggle -- gay

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[17] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 711 and 715 (1986).

[18] For example, Sylvia Law, in her article, *Homosexuality and the Social Meaning of Gender* (1988 Wis. L. Rev. 187), suggested that the root of social contempt for lesbians and gay men actually lies in gender stereotypes. By filling the social roles they fill, lesbians do not fit the traditional American concepts of femininity, and gay men do not fit the traditional American concepts of masculinity. According to law, this is perceived (generally) as a threat to the natural order. Homophobia, in Law's theory, "serves primarily to preserve and reinforce the social meaning attached to gender" (187). If this is true, one might posit a shift in decisions of whether an accusation of homosexuality is defamatory during the 1960s and 1970s, when feminism was encouraging a change in gender roles in America. For further discussion of this theory, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 617-24 and 631-33 (1992).

[19] For simplicity's sake, the author will henceforth refer mainly to "lesbians and gay men," as lesbians and gay men comprise arguably the largest organized and most politically active and vocal group of the five categories named. Of course, most of the issues discussed in this paper pertain also to bisexuals, transsexuals and transgendered persons, as well as many other social "outcasts" (such as AIDS patients).

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marriage;[20] the discharge and reinstatement of gay soldiers;[21] the custody battles of lesbian mothers,[22] the effect of the AIDS crisis on employers' insurance concerns and employees' job security;[23] the constitutionality of anti-gay-rights initiatives and ordinances;[24] and the dismissal of teachers who are (or are suspected to be) gay men or lesbians.[25] Underlying all these issues is the more basic issue of discrimination against and general contempt for non-heterosexual members of U.S. society. Yet, with the exception of "outing"[26] and hate speech,[27] the legal aspects of the *stigma* attached to lesbians and gay men are not normally discussed.

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[20] *See, e.g.*, John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, (Note) 42 Hastings L.J. 1415 (1991); Catherine M. Cullem, *Fundamental Interests and the Question of Same-Sex Marriage*, (Note) 15 Tulsa L.J. 141 (1979); and Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L.J. 173 (1992).

[21] *See, e.g.*, Gisela Caldwell, *The Seventh Circuit in* Ben-Shalom v. Marsh*: Equating Speech with Conduct*, (Note) 24 Loy. L.A. L. Rev. 421 (1991); Seth Harris, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, (Note)17 N.Y.U. Rev. L. & Soc. Change 171 (1989/1990); Troy R. Holroyd, *Homosexuals and the Military: Integration or Discrimination?* (Commentary) 8 J. Contemp. Health L. & Pol'y 429 (1992); and Randy Shilts, Conduct Unbecoming: Gays and Lesbians in the U.S. Military (1993).

[22] *See, e.g.*, Courtney R. Baggett, *Sexual Orientation: Should It Affect Child Custody Rulings*, 16 L. & Psych. Rev. 189- (1992); Gary L. Cardwell, Doe v. Doe: *Destroying the Presumption That Homosexual Parents Are Unfit -- The New Burden of Proof*, (Comment) 16 U. Rich. L. Rev. 851 (1982); and Marilyn Riley, *Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, (Note) 12 San Diego L. Rev. 799 (1975).

[23] *See, e.g.*, Jana Carey and Megan Arthur, *The Developing Law on AIDS in the Workplace*, 46 Md. L. Rev. 284 (1987); John F. Dudley, *The Medical Costs of AIDS: Abandoning the HIV-Infected Employee*, 30 Duq. L. Rev. 915 (1992); and J. Scott Kenney, *AIDS in the Workplace: Termination, Discrimination and the Right to Refuse*, 11 Dalhousie L.J. 581 (1988).

[24] *See, e.g.*, Mark David Agrast, *Being Gay in America: The Push for Recognition*, 18 Hum. Rts. 12 (Spring 1991); Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 Law & Ineq. J. 441 (1989); and S.F. Cohn and J.E. Gallagher, *Gay Movement and Legal Change: Some Aspects of the Dynamics of a Social Problem*, 32 Soc. Probs. 72 (1984).

[25] *See, e.g.*, Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 Rut.-Cam. L.J. 399 (1978); Jeanne LaBorde Scholz, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualification*, (Comment) 6 Hastings Const. L.Q. 663 (1979); and Merri Schneider-Vogel, *Gay Teachers in the Classroom: A Continuing Constitutional Debate*, 15 J.L. & Educ. 285 (1986).

[26] *See, e.g.*, Jon E. Grant, *'Outing' and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, (Note) 77 Cornell L. Rev. 103 (1992).

Specifically, the question of whether it is defamatory and thus possibly libelous to be called "gay" or "lesbian" (or some scurrilous variation thereon) remains virtually unaddressed in the literature. It is possible that part of the reason for this omission is that when the issue arises as part of a libel suit (as it often does), it is usually alleged the charge is false. If the accusation of homosexuality in these cases really is false, then the concern, of course, belongs to a heterosexual person, not a lesbian or gay man.[28]

There is one very recent article in the journal *Law & Sexuality* that has addressed the issue head-on. Randy M. Fogle, in his *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights and Free Speech*,[29] briefly addressed litigation of accusations of homosexuality. He concluded the courts have avoided the question of whether such accusations are defamatory by not creating a separate category of *per se* defamation for accusations of homosexuality.[30] His approach suggests both an assumption that such accusations *ought* to be considered defamatory and a reluctance to acknowledge the sometimes slow-moving and deliberate development of the common law. Fogle suggested that decisions based upon the existence of sodomy laws avoid the question of reputation altogether because it equates homosexuality with the commission of the crime of sodomy. However, Fogle chooses only to discuss cases that have been decided on such grounds in his analysis. This study, on the other hand,

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[27] *See, e.g.*, William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate Speech' Debate from a Lesbian/Gay Perspective, in* Henry Louis Gates, Jr., et al., Speaking of Race, Speaking of Sex 280 (1994).

[28] According to at least one author, however, even the truth can hurt when it comes to accusing someone of being gay. With regard to issues of homosexuality, a 1946 libel handbook specifically pointed out that when it comes to "sexual and marital irregularity and immorality the truth is, for practical purposes, always libelous." The author goes on to say that it is libelous *per se* "to call a woman a Lesbian, [sic] a prostitute, a nymphomaniac, an adulteress, a cradle-snatcher, a grave-digger, or a gold-digger," or to call a man "a homosexual, a lecher, an adulterer, a gigolo, or a pervert." He said the principle behind the law was that such matters, "however out of the ordinary, are so tremendously important to one's self-respect that it's well to make sure that they remain as private as possible . . . . This rule is both safe and decent." Charles Angoff, Handbook of Libel 2, 21 (1946).

[29] 3 L. & Sexuality 165, 180-184 (1993).

[30] This is a suggestion first advanced by Dean William Prosser in *Torts*, 760 (4th ed., 1971).

suggests that the diversity of reasoning in these defamation cases is much broader than Fogle has acknowledged.

In his study, Fogle dismissed what he perceived to be a complete failure by the courts to address the issue of whether it is injurious to one's reputation to be called gay or lesbian. He recommended the courts view the existence of sodomy and gay rights laws in a given community as *indicators* of the community's *attitudes toward* gay men and lesbians, and therefore as indicators of whether it would injure one's reputation to be called lesbian or gay.

Without addressing the strengths and weaknesses of his proposal, this paper departs from Fogle's expectation of judicial activism and his normative approach to the topic. Instead, this paper examines the "tough decisions" the courts have already attempted to make about defamation and homosexuality without passing judgment on the propriety of those decisions. Instead of suggesting a new way for the courts to interpret the question, this paper merely examines the evolution of the interpretation of the issue *within* the constraints current interpretation of the common law has already established for the courts. It observes to what extent decisions of whether it is defamatory to call someone gay are already possibly reflective of social norms -- including those decisions in which the imputation of criminality is the central issue.

Research Questions and Method

This paper will address the following research question: When and where has it been considered defamatory to call someone a homosexual?

This study will undertake a critical examination of defamation cases involving such accusations. A LEXIS search under the terms (libel! or slander! or defam!) and numerous variations on the terms "gay" and "lesbian" and "bisexual"[31] yielded at least 700 cases and

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[31] The exact terms used were: "gay or lesbian or fag or faggot or lezzie or lesbo or homo or homosexual or feminist or spinster or fop or effeminate or sphincter or amazon or queer or sapphite or sexual deviate or pervert or sodomite or fairy or faery or androgyn or unnatural sex acts or epicene or pansy or swish or limp-

300 A.L.R. annotations. In all, 52 cases proved to fit the parameters of this study. The earliest case is *Malone v. Stewart*,[32] decided in 1846. The most recent case, *Lancer Insurance Co. v. D.W. Ferguson*, was decided in January 1995.[33]

A related topic is that of AIDS and defamation. A search on LEXIS yielded a couple dozen cases and one or two A.L.R. annotations. A brief investigation revealed that many of these cases dealt with "false positive" HIV test results.[34] At least one case deals with the distinction between having AIDS and merely testing positive for exposure to the HIV virus, which causes AIDS.[35] The cases found in this category will not be examined more fully in this study because of space and time constraints.

The focus of the analysis in this paper will be two-fold: the decision of whether the statements at issue were defamatory and the reasoning used to explain that decision. These two elements will be compared and contrasted over time and from region to region of the country.

Analysis of Cases

The accusation of homosexuality is a very serious one to some people. In 1954, for instance, a short-tempered seaman considered such an accusation serious enough to take a meat cleaver to the head of the shipmate who had leveled that claim at him, murdering the ship's cook.[36] On the other hand, defamation cases tend to be a bit more

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wristed or bisexual or third sex or mannishness or freak or hermaphrodite or nance or sapphic or sapphist or gynandroid or gynandrous or transvestite or transsexual or butch or femme or dikey or dykey or dike or dyke." The search terms "queen" and "fruit" were attempted, but abandoned when the response to the request was that it was probable more than 1,000 cases would be brought up and there would be a charge for the search. Several unsuccessful attempts were made to narrow each of these two search terms into workable categories.

[32] 15 Ohio 319 (1846).

[33] 46 F.3d 1142 (9th Cir. 1995).

[34] *See*, Anderson v. Strong Memorial Hospital, 151 Misc.2d 353, 573 N.Y.S.2d 828 (1991).

[35] VanStraten v. Milwaukee Journal Newspaper-Publisher, 151 Wis.2d 905, 447 N.W.2d 105, 16 Media L. Rep. (BNA) 2408 (1989).

[36] Thompson v. Coastal Oil Co., 119 F. Supp. 838, 840 (D.N.J. 1954).

tame, sometimes even confusingly subtle. Take, for instance, the claim of David Logan, a gay man and owner of a hair salon in Alabama in the mid-'80s. He sued Sears, Roebuck & Co. for defamation because one of their credit card phone operators called him "queer" to a coworker. "[T]he word 'queer' just bothers me," he said in his deposition, "because I am not 'queer.'"[37]

Nevertheless, the general feeling among those filing suit because they've been accused of being gay or lesbian (or one of several dozen related epithets) is that homosexuality, if not sinful, is certainly despicable. The feelings of one former Secret Service agent are quite typical. He thought he would "no longer be regarded as 'heterosexual, moral, law-abiding, sexually normal, disease-free, blackmail proof, free from public ridicule and worthy of respect.'"[38]

The nature of the claims. Most of the defamation cases resulting from accusations of homosexuality are cases arising from alleged slander and deal with employment -- primarily any job that involves teaching, working with children, or working in the clergy.[39] Often, someone will inform an employer that an employee is a lesbian or a gay man out of spite or ill-will, hoping to get the employee fired or demoted. For instance, a Colorado schoolteacher's career was effectively derailed in 1991 by a spiteful former female business partner. After disagreements arose between the two, the business partner went to the schoolteacher's superintendent and charged the teacher with having attempted "to establish a homosexual relationship" with her and with having "proposed marriage."[40]

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[37] Logan v. Sears, Roebuck & Co., 466 So.2d 121, 123 (Ala., 1985).

[38] Buendorf v. National Public Radio Inc., 822 F. Supp. 6, 21 Media L. Rep. (BNA) 1842, 1847 (D.D.C. 1993).

[39] Another -- very widely cited -- case is that of Moricoli v. P&S Management Co. Inc., 104 Ill.App.3d 234, 432 N.E.2d 903 (1982), in which a singer was called a "fag" and was no longer allowed to perform at the club at which he regularly performed.

[40] Hayes v. Smith, 832 P.2d 1022 (Colo.App. 1991). *See also*, Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993), wherein the vice-president of a small college in Missouri attempted to

Also, whether or not their fears are unfounded, parents will frequently turn to school officials out of concern for their children's safety when they suspect a teacher is gay.[41]

Important, too, are those working with children, though not necessarily as teachers. In a 1974 case, the plaintiff was enjoined by the Boy Scouts of America from affiliating his "Sea Scouts" with Boy Scouts because of suspicions he was a gay man. Boy Scouts also steered two parents away from his "Sea Scouts" by implying that he was homosexual. In its opinion the court observed that,

> . . . there is no doctrine of law which would require a responsible organization like the Boy Scouts to accept individuals in leadership roles who have questionable character . . . . The future of its youth is a nation's most precious asset; yet by definition the young are frail, vulnerable and malleable. Their future strength may well be dependent upon whether they are exposed to positive leadership or abusive exploitation . . . . I do not find that those civil rights cases assuring blacks equal options have any precedential value in establishing for a purported homosexual any constitutional right to run a Boy Scout Troop. Bluntly, blackness and homosexuality are not the same phenomenon.[42]

Members of the clergy are the third category of individuals frequently accused of homosexuality explicitly in connection with their employment. One minister in Illinois was accused of luring members of his congregation into homosexual encounters.[43] In another case, a woman was denied priesthood in the Episcopal Church because she was accused of being "engaged in a homosexual liaison" with another woman, among other things.[44]

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discredit the Director of Teacher Education in the Missouri Department of Elementary and Secondary Education by asserting to reporters that she was a lesbian.

[41] For instance, in McCartney v. Oblates of St. Francis deSales, 80 Ohio App.3d 345, 609 N.E.2d 216 (1992), the contract of a man who had been high school teacher and school yearbook advisor for eight years was suddenly not renewed after rumors circulated through the small community where the high school was located. *See also* Cramton v. Brock, No. CA91-05-011, 1992 Ohio App. LEXIS 1285, at *1 (Mar. 12, 1992).

[42] Boy Scouts of America v. Teal, 374 F. Supp. 1276, 1280 (E.D.Pa. 1974).

[43] Davis v. Keyston Printing Service, 155 Ill.App.3d 309, 507 N.E.2d 1358, 14 Media L. Rep. (BNA) 1225 (1987).

[44] Monahan v. Sims, 163 Ga.App. 354, 294 S.E.2d 548 (1982). Somewhat related to these cases involving church personnel is a case in which defendant told a search agent that plaintiff was probably a homosexual after search agent had emphasized the "religious" and "moral" character of the prospective

Relatedly, businesses and careers are often perceived to be devastated by accusations of homosexuality. A typical example is that of a male model whose picture was used in an ad published in a gay periodical. In that case, in which the defendant was the popular gay magazine *The Advocate*, the court determined that "the imputation of unchastity is libelous *per se* regardless of whether a man or a woman is involved." Furthermore, "it implies he endorses the views and conduct described therein."[45]

Even large corporations can suffer harm from accusations of the homosexuality of their employees. In 1952, Neiman-Marcus Corp. claimed to be hurt by a book that contained the claim that all the department store's male employees were "faggots" and "fairies." According to the appellate court's decision, representatives of the corporation had said in a deposition that "prospective customers have been deterred from doing business with plaintiff Neiman-Marcus for fear of coming in contact with immoral, unchaste and indecent personnel." The company also suffered a "lowered morale" among its employees and found it "difficult to recruit personnel of high calibre and reputation," in addition to having gone to great expense to overcome "the adverse publicity and the demoralizing effect" of the book.[46]

Another body of cases deals with name-calling and vulgarity. Sometimes judges dismiss these as frivolous.[47] Other times they take them seriously, as in the 1941 case of

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employers (Boehm v. American Bankers Insurance Group, 557 So.2d 91 [Fla.App. 1990]). *See also*, Church of God Inc. v. Shaw, 194 Ga.App. 694, 391 S.E.2d 666 (1990).

[45] Rejent v. Liberation Publs., 197 A.D.2d 240, 611 N.Y.S.2d 866, 22 Media L. Rep. (BNA) 1826, 1828 (1994). *See also*, Palmisano v. Modernismo Publs. Ltd., 948 A.D.2d 953, 470 N.Y.S.2d 196, 10 Media L. Rep. (BNA) 1093 (1993), wherein both a picture and "false and imaginary first person statements" in an advertisement were taken to convey the impression that plaintiff male model was a gay man; and Wetherby v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1964), wherein two women who were engaged in the real estate and mortgage business and lived with a third woman were turned down for life insurance (for business purposes), apparently as a result of reports by private investigators that there were "strong suspicions 'of Lesbian action between those women' " and that they " 'definitely do no act like the feminine sex if they are.' "

[46] Neiman-Marcus v. Lait, 107 F. Supp. 96, 100 (S.D.N.Y. 1952).

[47] One such case is the case of Hammett v. Times-Herald Inc., 227 F.2d 328 (4th Cir. 1955), wherein a candidate for public office distributed a self-laudatory brochure which was mockingly criticized by defendant newspaper. The newspaper ended its scathing article with: "Anybody like to go with him steady?" Plaintiff claimed this sentence implied homosexuality by innuendo. The court disagreed, calling his claim

Morrissette v. Beatte.[48] A close decision at a horse show in Rhode Island resulted in an altercation, during which one of the two men involved used "a filthy term allegedly addressed to the plaintiff, meaning coition by one man with another *per os*." The judge in this case chastised the offending gentleman, calling such language "inexcusable" and deserving of "the severest condemnation." As if to prove his point, he wrote his entire opinion without once mentioning what he called the "vile expletive."

In another case of this genre, an amateur baseball player was called a "damn fat fag" by another player. The case was dismissed on procedural grounds (the plaintiff never informed the defendant of his intent to file suit), but a footnote described the player's self-professed disgust at having been called a "fag": "[It was] the lowest blow that was ever struck at me . . . . I have nothing but detest for homosexuals, just -- the mere mention, if I shook hands with a homosexual, then somebody told me that, I'd go out and wash my hands rights away."[49]

Relatives of decedents accused of being gay have also attempted to sue for defamation on behalf of the deceased (unsuccessfully, though, as reputation often is said to die with the individual). Perhaps the most interesting case of this kind was brought in 1979 by the parents of a young man reported in a news broadcast to have been involved in a homosexual relationship with his employer at the time he and his boss were murdered. His parents sued because, they claimed, he was not actually involved in the reported relationship and because they had been subjected to humiliation and ridicule as a result of the broadcast. The court rejected their argument, deciding that "[a] libel upon the memory of the deceased person that does not directly cause any personal reflection upon his relatives does not give them any right of action."[50]

"frivolous." *See also*, Fudge v. Penthouse International Ltd., 840 F.2d 1012, 14 Media L. Rep. (BNA) 2353 (1st Cir. 1988); and *Logan*, 466 So.2d 121 (1985).

[48] 66 R.I. 73, 17 A.2d 464 (1941). *See also*, Nowark v. Maguire, 22 A.D.2d 901, 255 N.Y.S.2d 318 (1963); and Manale v. City of New Orleans, Department of Police, 673 F.2d 122 (5th Cir. 1982).

[49] King v. Burris, 588 F. Supp. 1152, 1153 (D. Colo. 1984).

The issue of criminal imputation. One of the more common issues used by courts to determine whether an accusation of homosexuality is defamatory is that of criminality. Does an accusation of homosexuality imply homosexual conduct? In at least four cases, the courts decided it did not.[51] In three others, they decided it did impute criminal conduct to the plaintiff.[52] Interestingly, the imputation of criminality is not always based on whether there is a sodomy law on the books in a particular state. For example, in *Mazart v. State*,[53] a lower court in New York decided an accusation of homosexuality *did* impute crime to those accused, even though the sodomy law was no longer on the books in that state. On the other hand, in *Hayes v. Smith*,[54] the Colorado Court of Appeals determined an accusation of homosexuality was not slander *per se* expressly *because* there was no longer a law in that state making homosexual conduct a crime.[55]

The issues of perversion and unchastity. Imputations of perversion, unnatural sex and unchastity constitute the next largest topic on judge's minds when they address these defamation suits. The very earliest case found for inclusion in this study was decided on this point. The accusation in that case was that a "young girl" was called a hermaphrodite by an adult neighbor. In an impassioned opinion, the judge said such an accusation against a young girl "unsexes her; makes her a thing to be stared at; converts her

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[50] Justice v. Belo Broadcasting Corp., 472 F. Supp. 145 (N.D.Tex. 1979). *See also*, Flynn v. Higham, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (1983); and Keys v. Interstate Circuit Inc., 468 S.W.2d 485 (Tex. 1971).

[51] *See Moricoli*, 432 N.E.2d 903 (1982); *Morrissette*, 17 A.2d 464 (1941); Donovan v. Fiumara, 114 N.C.App. 524, 442 S.E.2d 572 (1994); and Stein v. Trager, 36 Misc.2d 227, 232 N.Y.S.2d 362 (1962).

[52] *See Nazeri*, 860 S.W.2d 303 (1993); Head v. Newton, 596 S.W.2d 209 (Tex.Civ.App. 1980); and Buck v. Savage, 323 S.W.2d 363 (Tex.Civ.App. 1959).

[53] 109 Misc.2d 1092, 441 N.Y.S.2d 600 (1981).

[54] 832 P.2d 1022 (Colo.App. 1991).

[55] Incidentally, the federal government, in an *amicus curiae* brief in 1966, urged the Supreme Court to limit liability in defamation cases to "grave" defamations, which it denoted as "those which accuse the defamed person of having engaged in criminal, homosexual, or other infamous conduct." (Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 56, *note* 12, 86 S.Ct. 657, 15 L.Ed.2d 582 [1966]).

into a monster, whose very existence is shocking to nature; and excludes her from social intercourse, and all hopes of marriage."[56]

Since then, the accusations of both male homosexuality and lesbianism have been added to the list of accusations that imply "unchastity and abnormal sexual behavior."[57] In one fairly recent case, a deputy sheriff in New York sued a newspaper for publishing a personals ad listing his name and telephone number as the contact for "further information regarding the meetings of a . . . Gay Community Center.'"[58] Apparently the same thing had happened to this same deputy sheriff a year and a half earlier, at which time he called the newspaper to inform the publisher that the ad was "false and unauthorized by him." The judge for the New York Supreme Court, Appellate Division, said the advertisement was libelous *per se* because it imputed "homosexual behavior" to the plaintiff, which, "[r]ightly or wrongly, many individuals still view . . . as immoral."[59]

The issue of the social acceptability of homosexuality. Deliberations concerning the ramifications of social acceptance or non-acceptance of homosexuality were among the most interesting. While many judges expressed the opinion that defamation decisions ought to reflect societal norms and sentiment, their interpretation of those norms and that sentiment varied dramatically. In New York in 1984, the defendants in one case claimed that the imputation of homosexuality was no longer defamatory in U.S. society because so many public officials had acknowledged their homosexuality that there was no longer any stigma attached to being gay. The New York Court of Appeals sent back a resounding rejection of that argument:

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[56] *Malone*, 15 Ohio 319 (1846).

[57] Schomer v. Smidt, 113 Cal.App.3d 828, 170 Cal.Rptr. 662, 663 (1980). *See also Regent*, 611 N.Y.S.2d 866 (1994).

[58] Dally v. Orange County, 497 N.Y.S.2d 947, 947-948 (N.Y. App. Div. 1986).

[59] *Id.* at 948.

> Rightly or wrongly, many individuals still view homosexuality as immoral. Legal sanctions imposed upon homosexuals in areas ranging from immigration to military service have recently been reaffirmed . . . . In short, despite the fact that an increasing number of homosexuals are publicly expressing satisfaction and even pride in their status, the potential and probable harm of a false charge of homosexuality, in terms of social and economic impact, cannot be ignored.[60]

And ironically, one year before Colorado voters passed "Amendment 2," a law attempting to deny equal protection from discrimination to lesbian and gay residents, a Colorado appeals court judge handed down the following decision:

> . . . A court should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel per se classifications. For a characterization of a person to warrant a per se classification, it should, without equivocation, expose the plaintiff to public hatred or contempt. However, there is no empirical evidence in this record demonstrating that homosexuals are held by society in such poor esteem. Indeed, it appears that the community view toward homosexuals is mixed [referring to the recent repeal of the state's sodomy law].[61]

Two years later and two states away, the Missouri Supreme Court expressed a very different opinion:

> The harm inflicted by defamation is particularly sensitive to the characteristics and situation of the injured party and of the society that surrounds him or her. Attitudes change slowly and unevenly among different groups. Despite the efforts of many homosexual groups to foster greater tolerance and acceptance, homosexuality is still viewed with disfavor, if not outright contempt, by a sizeable portion of our population....Matters of sexuality and sexual conduct are intensely private, intensely sensitive, and a false public statement concerning them is particularly harmful. In this society, an untruthful declaration concerning homosexual orientation must be considered as damaging to reputation as one concerning adulterous conduct."[62]

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[60] Matherson v. Marchello, 100 A.D.2d 233, 241-242, 473 N.Y.S.2d 998 (1984).

[61] *Hayes*, 832 P.2d 1022 (1991).

[62] *Nazeri*, 860 S.W.2d 303 (1993).

Generally, the courts seem quite cognizant of a role for the reflection of societal attitudes and norms in defamation cases concerning accusations of homosexuality. It is applying that role and interpreting what it means that raises questions and disagreement.

What is addressed when defamation is not. In 13 of the 52 cases included in this study, the plaintiff's defamation claim is simply not addressed in terms of whether it is exposes him or her to "hatred, ridicule and contempt." When not addressing these issues, judges have decided these cases on one of various libel defenses.[63] For instance, in 1985 the Massachusetts Supreme Court based its decision in *Appleby v. Daily Hampshire Gazette*[64] exclusively on the wire service defense, entirely avoiding any discussion of the defamation claim in that case. In the Pennsylvania Boy Scouts of America case mentioned at the outset of this analysis, the court discussed at length the issue of whether an accusation of homosexuality was defamatory. But without deciding whether it was, in fact, defamatory, the court decided in favor of the defendant under the qualified privilege defense.[65] In the same way, courts have also decided cases in favor of defendants under the defenses of opinion or fair comment[66] and truth,[67] without deciding whether the accusation at issue was defamatory.

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[63] Besides those mentioned in the text, courts have also relied upon: the inability to prove actual malice (*Buendorf*, 822 F. Supp. 6 [1993]); the nonexistence of a relational right (*see* cases cited *supra* note 50); and the fact that communication was not made to a third party (Moye v. Gary, 595 F. Supp. 738 [S.D.N.Y. 1984] and *Monahan*, 294 S.E.2d 548 [1982]).

[64] 395 Mass. 32, 478 N.E.2d 721, 11 Media L. Rep. (BNA) 2372 (1985).

[65] *See Boy Scouts of America*, 374 F. Supp. 1276 (1974). Qualified privilege has also been used by defendants to overcome a finding that their accusation of homosexuality was libelous or slanderous *per se*. *See McCartney*, 609 N.E.2d 216 (1992); Key v. Ohio Dept. of Rehabilitation and Correction, 62 Ohio Misc.2d 242, 598 N.E.2d 207 (1990); *Wetherby*, 201 A.2d 344 (1964).

[66] *See* Dworkin v. L.F.P. Inc., 839 P.2d 903, 20 Media L. Rep. (BNA) 2001 (Wyo. 1992); and Martin v. Municipal Publications, 510 F. Supp. 255 (E.D.Pa. 1981).

[67] *See Dworkin*, 839 P.2d 903 (1992); *Logan*, 466 So.2d 121 (1985); and Beason v. Harcleroad, 105 Ore.App. 376, 805 P.2d 700 (1991).

The issue also has been ignored in cases dismissible on procedural grounds. In *King v. Burris*,[68] for example, an amateur baseball player brought suit when he was called "a damn fat fag" by another player. Ignoring the question of defamation altogether, the Colorado judge in this case instead launched into a lengthy eulogy of America's favorite pastime, eventually dismissing the case on procedural grounds because the plaintiff failed to inform the defendant of his intent to sue at least five days before bringing action.

In still other cases, the judge has remanded the case for further proceedings without any discussion of the issue of defamation, usually when one party had appealed a lower court decision pertaining to another aspect of the case. For instance, Major Marsha Lutz, a highly regarded soldier in the U.S. Air Force, brought suit in 1991 when three subordinates stole (and circulated amongst the troops) a letter from her office that "could be read to imply that Lutz was involved in a lesbian relationship with her civilian secretary." She argued the men had passed the letter around "in an attempt to harm or ruin her reputation and career." The Secretary of the Air Force attempted to have the case dismissed as being "incident to military service," and thus a case which belonged in military, not civilian, courts. The Ninth Circuit Court of Appeals disagreed, remanding the case for further proceedings in the civil courts, without determining whether the implication of homosexuality was defamatory in this case.[69]

The possible implications of decisions not addressing the "hatred, ridicule and contempt" standard in any way will be addressed in the concluding section of this paper.

Discussion and Conclusions

The question of whether it is defamatory to accuse someone of being lesbian or gay remains largely an open one, and one that is still receiving varied interpretation. It is difficult to discern any trend in decisions over time, or within jurisdictions. No one portion of the country seems to have litigated significantly more or fewer cases than any other, although the lion's share of cases decided on the issue of criminal imputation seem to have been decided in the state of New York. There seems to be a slight lean toward deciding accusations of homosexuality *are* defamatory in the Northeastern and Midwestern United States and an even split on the decision of whether such accusations are defamatory in the South.

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[68] *King*, 588 F. Supp. 1152 (1984).

[69] Lutz v. Secretary of the Air Force, 944 F.2d 1477 (9th Cir. 1991). *See also King*, 588 F. Supp. 1152 (1984); Kirschner v. Broadhead, 671 F.2d 1034 (7th Cir. 1982); and Tollett v. U.S., 485 F.2d 1087 (8th Cir. 1973).

A more noticeable trend is the inclination of courts to decide whether the statement in question was defamatory or not defamatory -- one way or the other -- prior to 1970, and their seeming reluctance to do so since then. In all 10 cases included in this study before 1970, the courts articulated a decision as to whether the accusation was defamatory. Since then, about half the cases have gone through the appellate level without any determination as to whether the plaintiff had been subjected to "hatred, ridicule or contempt." These cases were largely decided in favor of the defendant on other grounds. It is unclear whether this trend might be due to developments in libel law, developments in the gay and lesbian liberation movement and the increased visibility of gay men and lesbians as a minority group, or to some other factor entirely. The courts' opinions themselves offer no explanation for recent avoidance of the defamation issue.

What is most interesting about the cases in this study is the reasoning found within them. The wording of the opinions themselves seems to indicate a reliance on societal norms, or at least an acknowledgement that the interpretation of what is defamatory will or should change along with societal temperament. There is, of course, no reliable gauge by which to measure this temperament. Any reflection of societal mores to be detected may not be as obvious as the existence of a trend on a time-line or a clearly intolerant region of the country. Therefore, it is possible that the written opinions in these cases primarily reflect only judges *perceptions* of social norms, and not the norms themselves. Or perhaps the rather mixed reaction of the courts simply reflects a profound ambivalence on the part of U.S. society as to whether homosexuality is despicable or not-so-bad, normal or abnormal.

In 1981, a New York judge observed that the impact of an accusation of homosexuality on "the collective mind" of a university community was undoubtedly considerably less than on that of a "conservative rural American village."[70] Further research on this topic should attempt a more in-depth analysis of these cases, examining not only region of the country, jurisdiction and time-frame, but also the size of the communities in which these offenses occurred. The decisions might further be analyzed by searching for parallel developments in the resolution of other lesbian and gay legal issues, such as sodomy laws, custody battles and gay rights ordinances.

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[70] *Mazart*, 441 N.Y.S.2d 600 (1981).

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RADIO PUBLIC AFFAIRS PROGRAMMING SINCE THE FAIRNESS DOCTRINE

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Radio Public Affairs Programming Since the Fairness Doctrine

The Telecommunications Act of 1996 is the most significant piece of broadcast legislation since the Communications Act of 1934. Its provisions will undoubtedly have a profound influence on nearly every aspect of mass communications - concentration of media ownership, licensing, programming (the V-Chip), cable television rates, telephony's entry into cable, cable's entry into telephony, and obscenity and indecency to name the major components. In most of these areas regulations have been dramatically watered-down or entirely eliminated, continuing a trend of deregulation started in the 1980s.

However, in spite of this important legislation at least one important regulatory issue remains difficult to resolve: the Fairness Doctrine. Even though it was officially eliminated in August 1987 (Meredith Corp. v. FCC, 1987; Federal Communications Commission, 1987) politicians and bureaucrats periodically raise the possibility of its reinstitution. Perhaps it continues to be an issue because few, if any, individuals have a clear understanding of how effective the doctrine was to begin with. When it was policy, any affect it had on broadcasters was difficult to ascertain. Since its demise, the debate has tended to be anecdotal and somewhat subjective. Therefore, in the shadow of other more spectacular legislation, the Fairness Doctrine remains an issue simply because its effects were not, and are not, fully understood.

Understanding the impact of the Fairness Doctrine is important because politicians continue to raise the issue, and because the Communications Act of 1934 requires radio and television stations to serve the "public interest, convenience, and necessity" (U.S. Congress, 1934). The Fairness Doctrine was one of the means by which the FCC attempted to influence broadcasters to fulfill this responsibility. Essentially, the Doctrine required each broadcast station to devote a significant amount of airtime to the discussion of important political and social issues. Usually this coverage - known as "Public Affairs" programming - took the form of regularly scheduled discussion/interview programs. Supposedly, these programs equitably represented the issues' various perspectives. It was also each broadcaster's responsibility to regularly survey community leaders in order to know what issues were important. In essence, the Doctrine's purpose was to compel radio and television station operators to provide valuable programming they might not otherwise offer if left to decisions based solely on marketplace forces.

Many believe the Fairness Doctrine provided valuable "access" for groups that otherwise were unable to have their opinions and needs presented (Sohn, 1994); that since its elimination in 1987 we have been left in an ethical vacuum where technology and economic strength determine the public interest (Matelski, 1995). Others have asserted the Doctrine infringed on broadcasters' First Amendment rights (Corn-Revere, 1994), or that it never engendered legitimate discussion to begin with (Administrative Law Review, 1995; Cronauer, 1994; Cuomo, 1993).

In 1984 the FCC released a study claiming the doctrine had a "chilling effect" on the discussion of controversial public issues; that its regulatory requirements discouraged - rather than encouraged - the programming of controversial issues on radio and television stations (Federal Communications Commission, 1984). However, some felt the strength of the commission's supporting evidence was suspect, and one follow-up study (Aufderheide, 1990) concluded the chilling effect never existed. So, the question remained as to whether the Fairness Doctrine was successful in influencing broadcasters to provide meaningful programming covering the different perspectives of important issues.

Most written material about the Fairness Doctrine's impact has dealt with the qualitative aspects of balance and access. However, no research has actually compared the amount of issue-oriented discussion before and since the Doctrine's demise. Therefore, this study attempted to find out if the number of Public Affairs hours on radio has significantly changed since before the Fairness Doctrine was removed in August of 1987. There was no attempt to analyze the subject matter of the programming, but simply to determine if the number of hours devoted to Public Affairs had significantly changed in the time since the Doctrine. This analysis focused on radio stations because most of the threats to reinstitute the Doctrine have come as a response to controversial radio talk shows and politically charged religious broadcasts (Wiley, 1994).

Method

To compare broadcasters' performance before and after the removal of the Doctrine, general managers and news directors of eighty-seven radio stations were contacted and asked to describe the amount of time each week their station devoted to public affairs programming, when this programming was scheduled, and how these characteristics had changed since the Fairness Doctrine. Specifically, each respondent was asked to calculate the average weekly amount of time their station programmed Public Affairs during the first six months of 1987 (before the

Doctrine was removed,) and again in 1995. If the interviewee did not recall the programming under the Doctrine - or was not at the station in 1987 - he or she was asked to refer to the station's Public File records for that year. The interviewees were asked to count all programming where current issues of importance to their audience were discussed. This included regularly scheduled interview programs (such as talk shows and pre-recorded interview shows,) as well as occasions where expert opinion was inserted into newscasts as a form of discussion or analysis. For example, a politically oriented talk show that featured discussions of current topics would be included in the tabulation, as would a local feature including information on an upcoming bond referendum.

The respondents were asked not to include regularly scheduled newscasts where six to eight story headlines were read without any kind of analysis. They were also instructed not to count public service announcements, or call-in shows where the subject matter dealt with something other than the discussion of issues of significant importance to their communities. A talk show that offered the host's advice on psychiatric, medical, or financial matters would not be counted because the information addressed individual circumstances rather than the interests of whole communities. The overall task was to determine, and compare, how much airtime in an average week in 1987 and 1995 was devoted to discussion of current topics.

The respondent stations were chosen as a result of having been awarded one of the National Assocation of Broadcasters' (NAB) annual Crystal Awards for community service. Each year since 1987 the NAB has recognized ten stations for their community involvement. Awards are determined by the stations' local programming - such as news, public service announcements, public affairs shows, community awareness campaigns, etc. - as well as evidence of interaction with community groups and businesses, station sponsored service events, and involvement of individual staff members in civic organizations and community leadership roles. This sample of stations is useful in gaining insight into Fairness Doctrine effects because it identified industry individuals in a wide array of formats and market sizes who - because of their recognition for community involvement - have been particularly aware of the Doctrine's principles and influence. In the nine years from 1987 to 1995 the NAB gave out ninety Crystal Awards. Eighty stations took part in this study (three had won the Crystal Award more than once, three no longer existed, and four declined to participate. A list of the stations making up the survey sample can be found in the Appendix.) It should not be assumed the data gathered from these stations exactly reflects the nature of Public Affairs programming on all stations, but rather should be used to identify and understand possible trends in Public Affairs.

Of the eighty stations sampled, twenty-eight were in the Top 50 markets, sixteen were stations serving markets ranked 51-250, and thirty six were in small markets ranked lower than 250 in market size. Twenty-four of the stations were formatted News/Talk, fifteen were Adult Contemporary, fourteen were Country, eight were Eclectic (mixing news and different styles of music,) four were Oldies, four were Urban, three were Adult Oriented Rock (AOR,) three were Middle of the Road (MOR,) two were Hispanic, and one each of Contemporary Hit Radio (CHR,) Classical Music, and Children. Fifty-three were AM stations and twenty-seven were FM stations.

FINDINGS

The following data compared each station's average weekly amount of Public Affairs programming before the Fairness Doctrine was eliminated in 1987, with the average weekly amount broadcast in 1995. The data was compiled by including each station's regularly scheduled public affairs interviews - whether pre-recorded or live - as well as other programming where public issues were discussed in some detail. This "other" type of programming included the portions of telephone call-in shows where political and/or community issues were discussed, live or pre-recorded interviews outside of regularly scheduled features, and portions of regularly scheduled newscasts where an issue was given more analysis than would occur normally.

Overall, the data showed an increase in the average number of weekly hours devoted to Public Affairs programming since the Fairness Doctrine's elimination in 1987. Table 1 shows that prior to the Doctrine's elimination in 1987 the surveyed stations discussed public issues a mean average of 20.92 hours each week. In 1995, the number was 28.04 hours, an increase of 34 percent. However, the large range of time devoted to this type of programming - from zero to 140 hours per week - indicated not all stations have programmed Public Affairs the same way. Some stations allotted many hours to issue-oriented discussion while others offered none. This range remained unchanged from 1987 to 1995.

Table 2 shows this increased Public Affairs time was found on both the AM and FM bands. While AM stations as a whole continued to provide more hours of Public Affairs, both FM and AM stations had proportionally increased the amount of time devoted to these features. AM stations, on the average, programmed Public Affairs 33.88 hours each week in 1995 - an increase of 8.94 hours over 1987. FM stations, on the average, programmed 17.15 hours of Public Affairs each week in 1995 - up 6.20 hours from 1987.

So, taken as a whole, there appeared to be more discussion of public affairs on the stations in 1995 than before the government stopped requiring such programming, and this increase had taken place on both the AM and FM bands. To understand why there was such a wide range in the amount of time devoted to Public Affairs, the characteristics of the stations' formats and market sizes were analyzed.

Formats

Certain types of stations were inclined to program more Public Affairs than were others, as indicated in Table 3. One can see the single Public Radio station included in the survey devoted the most time to Public Affairs: 140 hours per week. It is important to note this is the same amount of time this station devoted to Public Affairs in 1987, so evidently the Fairness Doctrine had little impact on how much time this station programmed Public Affairs. Other than the Public Radio station, and a Children's formatted station not on the air in 1987, the next highest ranked format was News/Talk with an average of 59.13 hours of Public Affairs in 1995. This figure represents the most significant change in time devoted to such programming, an increase of 62%.

Besides the News/Talk stations, the remaining stations provided very little meaningful change in Public Affairs time. While some stations showed dramatic percentage increases (CHR, Country, Urban, Oldies), the increase in actual time was small. For example, while the Contemporary Hit Radio station showed a seemingly impressive 300% increase, it actually only programmed Public Affairs six hours per week in 1995, up from two hours in 1987.

The same is true for the Oldies, Country, and Urban Contemporary stations where only small hourly increases had taken place since 1987. The only statistically significant change took place in the News/Talk format (p=.008) where those stations were, on the average, programming over twenty-two additional public affairs hours every week. In no case did a format show a decrease in public affairs programming; all either remained unchanged from the final year of the Fairness Doctrine, or increased their Public Affairs time.

To gain a clearer understanding of the influence of format, the stations were grouped into three main format "types" as shown in Figure 1: News/Talk, Mixed, and Music. The twenty-four News Talk stations identified in Table 3 remained as one group. Stations where a significant amount of issues/community-oriented conversation was blended with music programming, formed a second group called Mixed formatted stations. This group consisted of the Public Radio station, the Eclectic stations, and the Hispanic stations. And, stations that relied mainly on continuous music for their format made up a third group called Music stations. Music stations included the Adult Contemporary, Adult Oriented Rock, Contemporary Hit Radio, Country, Middle of the Road, Oldies, and Urban formats. (In that the primary focus of this study was to determine if the amount of Public Affairs programming had changed under the deregulatory climate, the Children's station was not included in this analysis because it was not on the air in 1987.)

In Figure 1 the News/Talk stations' average increase of 22.34 hours per week (59.13 in 1995 vs. 36.79 in 1987) was the most significant change. This increase seemed even more relevant given that in 1987 the Mixed stations programmed more hours of Public Affairs (40.06) than did the News/Talk stations; however, the Mixed stations showed virtually no change since that time (40.93 in 1995.) While the Mixed stations continued to devote a lot of time to Public Affairs, by 1995 the News/Talk stations were providing more regular exposure to this type of programming. As far as the Music stations were concerned, they generally only devoted a marginal amount of programming to public issues in 1987 and 1995 (4.54 hours in 1987, 5.72 hours in 1995.)

So, by looking at format types, a station's format was an indicator if changes took place in the amount of Public Affairs programmed since the Fairness Doctrine years. Both the Music and the Mixed format types seemed unaffected by the passage of time and/or changes in the regulatory environment. Conversely, since 1987 News/Talk stations had dramatically increased the amount of time spent discussing important issues.

Market Size

The surveyed stations served across the spectrum of market sizes. Three Los Angeles (Market #2) stations were included as were two Chicago stations (Market #3) and numerous other well-known stations in large markets. Additionally, many stations in markets too small to be ranked were also surveyed. To determine if market size might have had an influence on changes in the time devoted to Public Affairs, stations were grouped according to the market rankings in the 1995 Broadcasting and Cable Yearbook. Stations in markets 1 - 50 were considered Large Market stations, markets 51- 250 were labelled Medium Markets, and markets below 250 were identified as Small Markets. Figure 2 shows the amount of hours devoted to Public Affairs since the Fairness Doctrine increased in all market sizes; the most dramatic change having occurred in the Medium markets. Under the Fairness Doctrine in 1987, Medium Market stations programmed an average of 12 hours of Public Affairs each week; however in 1995 this figure had nearly tripled to 35.43. In 1995 Large market stations, on the average, ran 53.27 hours of Public Affairs each week, up from 48.30 in 1987. Meanwhile, Small market stations added a little over four hours per week (3.13 in 1987, 7.30 in 1995.) So, while both Small and Large market stations increased their public affairs time, the most visible boost took place in the mid-sized markets.

Figure 3 combines the information displayed in Figures 1 & 2 so that the relationship between market size and station format is shown. In this scenario the Large Market News/Talk stations devoted an average of 81.45 hours per week to Public Affairs discussion in 1995, compared to 70.50 hours in 1987 - an increase of 10.95 hours. The Large Market Mixed stations continued to discuss public affairs more than other formats - an average of 89.80 hours each week - but showed no change from 1987. The Music stations in all markets - while marginally increasing public affairs - obviously did not consider the discussion of issues part of their mission or responsibility, as evidenced by the small amount of time devoted to this type of programming. The most significant change took place in Medium market News/Talk stations, with these stations showing an average increase of over 61 hours per week: 77.70 in 1995, up from 16.30 in 1987. While stations in all formats and market sizes increased their Public Affairs programming from 1987, the most meaningful increases were found in these Medium market News/Talk stations.

To summarize all the data to this point, there had been an increase in the average number of hours devoted to Public Affairs programming on the surveyed radio stations since deregulation removed the Fairness Doctrine in 1987. This change was most visible in the News/Talk format. The News/Talk stations in this survey were devoting more time than ever before to issue-oriented discussion, and seemed to be doing so in all market sizes; the most visible changes having taken place in medium markets. Other format types, while slightly increasing their average public affairs time, generally appeared to have been treating Public Affairs as they had before.

Station management was asked to comment on the nature of Public Affairs changes at their stations specifically, and across radio in general. Based on their responses, there appeared to be two variables that influenced the overall greater quantity of Public Affairs programmed in 1995, particularly on Medium market News/Talk stations. These variables were the affordability of new technologies, and a possible shift in the paradigm of how newscasts were presented.

According to the respondents, increased availability of network programming via satellite made it economically viable for medium market stations - that previously would not have had the means to produce a News/Talk format - to provide the service. By the early 1990s it was economically feasible for stations outside of Large markets to carry network talkshow hosts via satellite. While no single Medium market station could afford Rush Limbaugh, hundreds of them together were able to afford him on a network feed. Where, previously, many of these stations would carry only newscasts mixed with occasional coverage of live news events, they began to add liberal doses of "discussion" from talk show hosts talking to listeners across the country on toll free 800 exchanges. Quickly, most any station that could afford a satellite dish and transponder could program News/Talk. The remarks of two Medium Market managers expressed, that what was before unobtainable became affordable. Rick Sellars of WMT in Cedar Rapids, Iowa indicated the connection was simple: "There's more public affairs shows because the economics of running a radio station and satellites (makes it affordable.)" Likewise, Tom Bunger of KNOM in Nome, Alaska said, "It's what our audience wants. . . We have resources today (technology) that we didn't have back then."

The second reason managers indicated there was more Public Affairs time in 1995 was a change in how some radio stations presented newscasts. Newscasts that previously contained only "facts" in the form of headlines, increasingly contained doses of interpretation from community leaders and experts. Coupled with the growth of News/Talk programming, this newscasting strategy allowed Public Affairs to be not only tolerable, but desirable, for mass audiences. This adjustment may have been influenced by an awareness on the part of broadcasters that listeners were expecting more than simple headlines. A news spokesperson for WTMJ in Milwaukee explained that station's newscast philosophy:

> There's more (public affairs) during the day now than there was in the past. A station that is responding to people will cover the important issues. The ultimate goal is the same - to serve the listeners and be fair.

And,

> We continually incorporate opinions of local agencies and experts in our news coverage. (Nick DeLucca of KCBS, San Francisco.)
>
> The (news) topics are now more issue-oriented. We're trying to become more aware of local issues and respond to them. (Dick Kliesch of WLBK in DeKalb, Illinois.)
>
> You stand out in the community by doing it. (Dan Duprey of WLNG in Sag Harbor, New York.)
>
> People want it (in-depth news analysis) . . . we sound more local. (Bob DeWitt of WSJM in St. Joseph, Michigan.)

> There are no ghetto hours anymore. (Michael Spears of KRLD, Dallas.)

However, it should be noted at least three managers indicated tighter economic conditions influenced the tendency toward more detailed newscasts. Allison Hodges of KGO in San Francisco said her staff was "bare bones" so she couldn't do the amount of stand-alone Public Affairs features done in the past, requiring the information to be incorporated in news stories. Similarly, Joyce Lagios of News/Talk WAKR in Akron explained that, at one time, her station had separate News and Public Affairs departments; but because of economic considerations the two divisions were merged, and that regular newscasts, therefore, incorporated more "discussion" of the issues:

> We used to have a news department and a public affairs department. Now they work as one unit, there is no division. Most of it (public affairs programming) is now handled through the newscasts.

And, perhaps most to the point was this statement from Ed Sherman of WPSK in Pulaski, Virginia, "Revenue stations don't want to donate airtime for Public Affairs. . . We are putting more feature stories within newscasts."

So, whether broadcasters were responding to audience preferences, or economic pressures, or both, they were incorporating Public Affairs information in regular newscasts in greater doses than before. This, coupled with the popularity and affordability of News/Talk formats, caused the amount of Public Affairs time from 1987 to 1995 to increase across all stations and formats in this survey. Accordingly, Public Affairs information became part of the mainstream portions of most formats. Few of the managers believed regulatory conditions ever influenced Public Affairs. As these managers described it:

> Stations that are winning don't need the Fairness Doctrine to tell them what to do. . . Even without the Fairness Doctrine the market dictates that stations that don't do those types of things will fail. (Mike Beckenbach of Eclectic formatted WVPO in Stroudsburg, Pennsylvania)

> Many stations have a growing understanding it's our own best business interest to be involved with the community. (Laura Lee Geraghty of WCCO in Minneapolis)

Summary

Generally, it can be concluded the status of the Fairness Doctrine had no influence on the amount of Public Affairs provided by the radio stations in this study. Ironically, the data indicated more issue-oriented discussion was programmed since the time of the Fairness Doctrine. These increases occurred in response to technological, philosophical, and economic conditions. The meaningful increases in time were limited to News/Talk stations - particularly in Medium markets - where syndicated News/Talk became affordable. Nevertheless, outside of this market and format type - while not significantly increasing the time devoted to Public Affairs - stations adjusted to perceived new realities by adding "expert" opinions and analysis to regularly scheduled news features.

Contrary to the fears of some, this data indicated Public Affairs programming did not disappear from the broadcast landscape with the removal of the Fairness Doctrine, but may have actually positioned itself in the mainstream of many stations' formats. Thus, future arguments to reinstate the Fairness Doctrine should emphasize qualitative rather than quantitative aspects because there likely was more Public Affairs on the radio in 1995, in all dayparts, formats, and market sizes, than occurred under the Doctrine in 1987. Conversations with the stations' management indicated this increased Public Affairs time resulted from programming strategies, economic realities, and technological development autonomous of regulatory policy.

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Appendix
STATIONS SURVEYED

KBIG - Los Angeles, CA
KGO - San Francisco, CA
KZZY - Devils Lake, ND
WPSK - Pulaski, VA
KFGO - Fargo, ND
KKCS - Colorado Springs, CO
KQRS - Minneapolis, MN
WEAS - Savannah, GA
WVPO - Stroudsburg, PA
KBHP - Bemidji, MN
KPSN - Phoenix, AZ
KSJN - St. Paul, MN
WWTC - Minneapolis, MN
KCBS - San Francisco, CA
KOJM - Havre, MT
KRMG - Tulsa, OK
WCCO - Minneapolis, MN
WXYV - Baltimore, MD
KASE - Austin, TX
KNNN - Central Valley, CA
KRLD - Dallas, TX
WGN - Chicago, IL
WLNG - Sag Harbor, NY
WTTR - Westminster, MD
WUSL - Philadelphia, PA
WZWW - State College, PA
KIRO - Seattle, WA
KMEL - San Francisco, CA
KQEG - La Crosse, WI
KTMT - Medford, OR
WFOB - Fostoria, OH
WLVQ - Columbus, OH
WOKQ - Dover, NH
WRGA - Rome, GA
KENI - Anchorage, AK
KFOR - Lincoln, NE
KLOS - Los Angeles, CA
KMIT - Mitchell, SD
KOMC - Branson, MO
KGFW - Kearney, NE
KRGI - Grand Island, NE
KROE - Sheridan, WY
WBZ - Boston, MA
WOJO - Chicago, IL
KTTX - Brenham, TX
WAKR - Akron, OH
WDLB - Marshfield, WI
WHBC - Canton, OH
WHIZ - Zanesville, OH
WILM - Wilmington, DE
WSJM - St. Joseph, MI
WTSN - Dover, NH
WYAY - Atlanta, GA
KABC - Los Angeles, CA
KNCO - Grass Valley, CA
KSEN - Shelby, MT
WCTC - New Brunswick, NJ
WDBC - Escanaba, MI
WGST - Atlanta, GA
WJON - St. Cloud, MN
WLBK - DeKalb, IL
WSM - Nashville, TN
WTLC - Indianapolis, IN
KTNN - Window Rock, AZ
KVON - Napa, CA
WAGE - Leesburg, VA
WBAL - Baltimore, MD
WBEL - Beloit, WI
WKKR - Auburn-Opelika, AL
WMT - Cedar Rapids, IA
WTMJ - Milwaukee, WI
WTRE - Greensburg, IN
WWVA - Wheeling, WV
KNOM - Nome, AK
WMAL - Washington, DC
WQBA - Miami, FL
WFMD - Frederick, MD
KMOX - St. Louis, MO
KHAS - Hastings, NE
KPRS - Kansas City, KS

Table 1
RADIO STATION AVERAGE WEEKLY PUBLIC AFFAIRS HOURS, BEFORE AND AFTER THE FAIRNESS DOCTRINE'S REMOVAL

	Mean Hours	**Minimum**	**Maximum**
1987	20.92	0.00	140.00
1995	28.04	0.00	140.00

Table 2
BROADCAST BAND AVERAGE WEEKLY PUBLIC AFFAIRS HOURS, BEFORE AND AFTER THE FAIRNESS DOCTRINE'S REMOVAL

	AM	**FM**
1987	24.94	10.95
1995	33.88	17.15

Table 3
AVERAGE WEEKLY HOURS DEVOTED TO PUBLIC AFFAIRS BY FORMAT

FORMAT	n	Mn hrs. 1987	Mn hrs. 1995	% chg.	p
Public Radio	1	140.00	140.00	0	na
Children	1	not on air in 87	115.00	na	na
News/Talk	24	36.59	59.13	+62	.008
Eclectic	8	35.59	36.03	+1	.531
Middle of Road (MOR)	3	23.02	23.02	0	na
Hispanic	2	21.50	21.50	0	na
Contemporary Hit Radio (CHR)	1	2.00	6.00	+300	na
Country	14	2.65	5.69	+115	.113
Adult Oriented Rock (AOR)	3	4.50	4.50	0	na
Adult Contemporary	15	3.95	4.12	+4	.796
Urban Contemporary	4	1.92	3.50	+82	.452
Oldies	4	1.25	1.63	+30	.297

Figure 1
AVERAGE WEEKLY PUBLIC AFFAIRS HOURS BY FORMAT CLUSTER

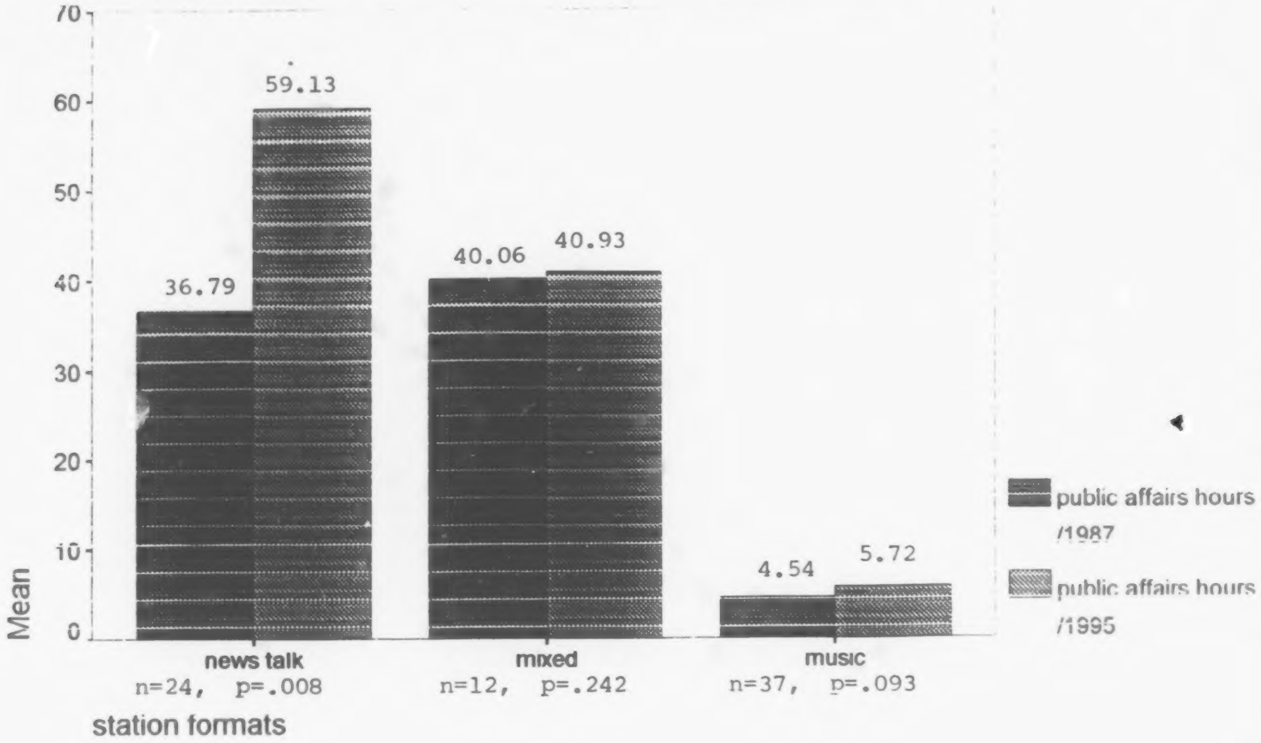

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Figure 2
AVERAGE WEEKLY PUBLIC AFFAIRS HOURS BY MARKET SIZE

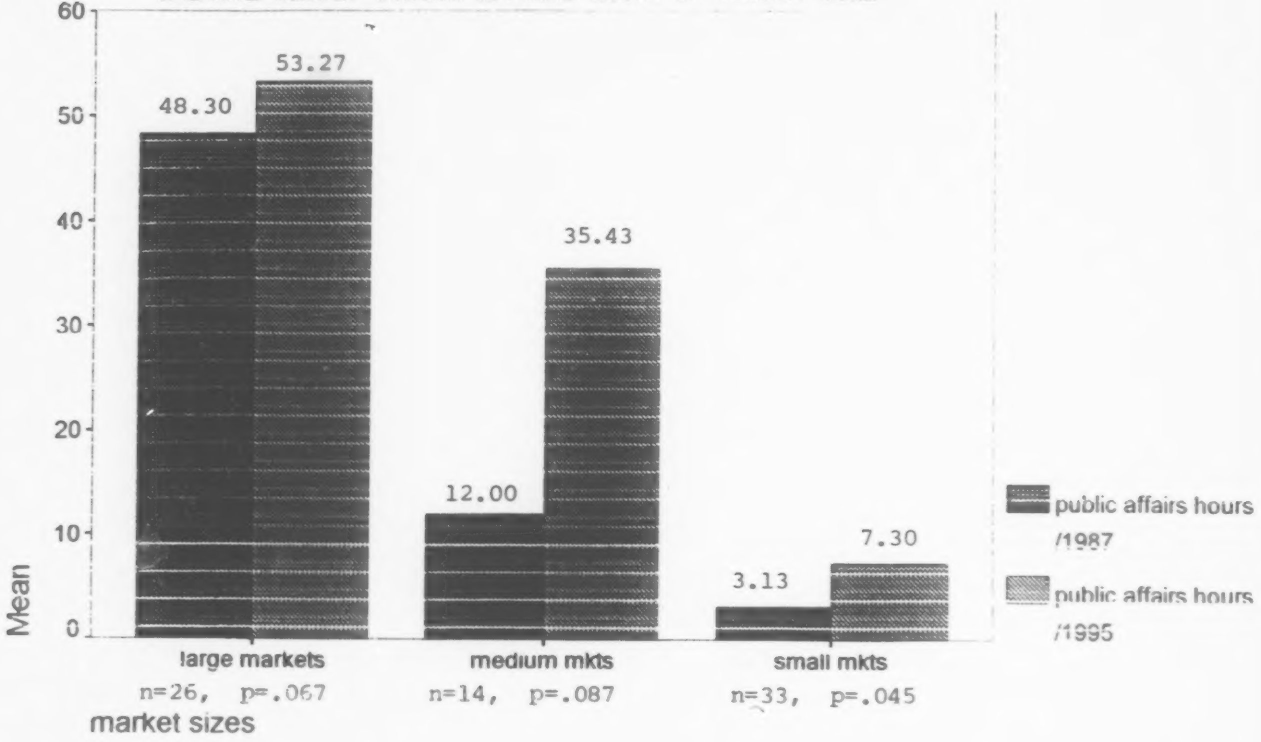
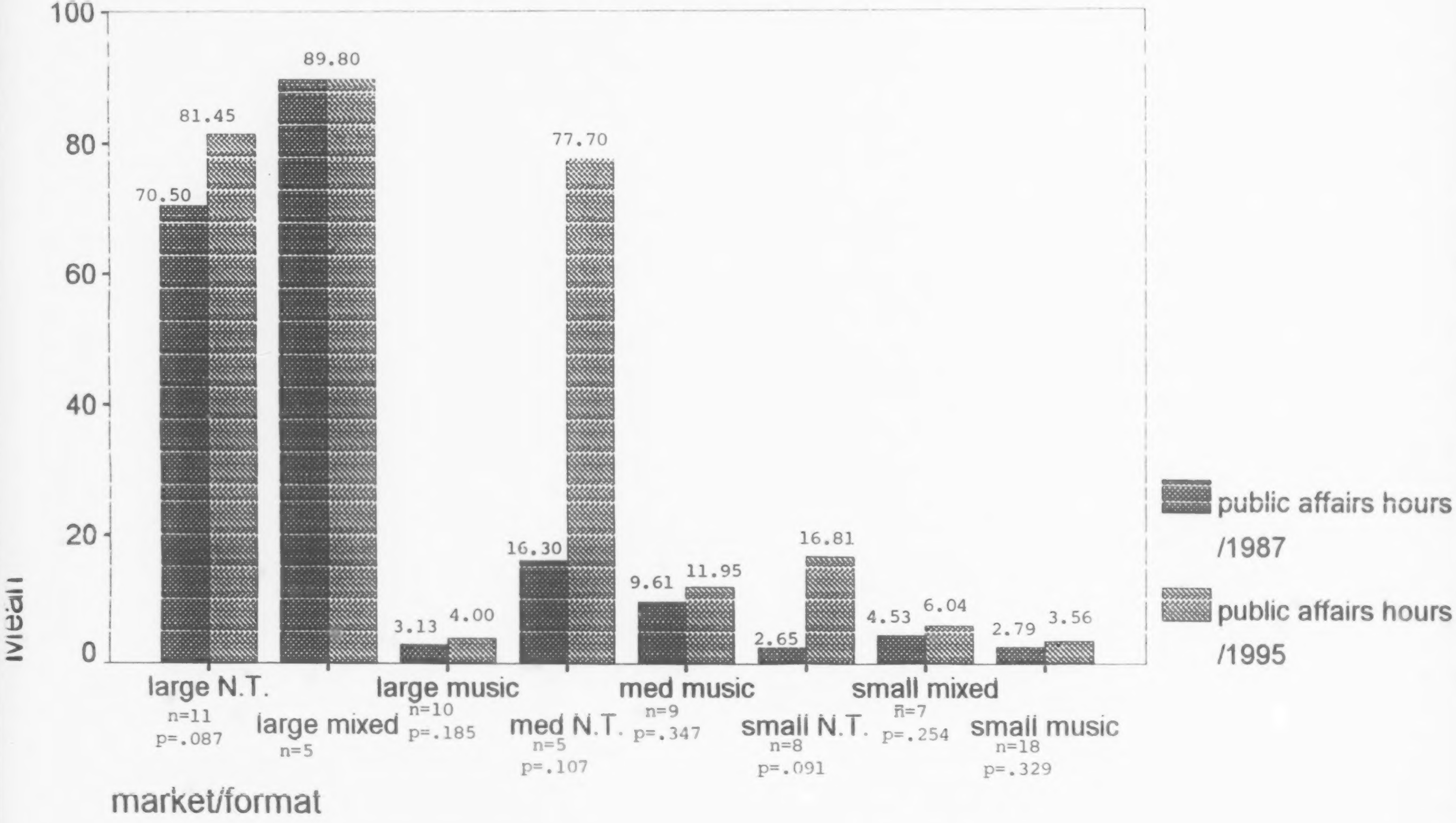


Figure 3
PUBLIC AFFAIRS HOURS BY FORMAT AND MARKET SIZE



(no medium-mixed formatted stations were in the population)

Running head: COHEN V. COWLES MEDIA CO. REVISITED

Cohen v. Cowles Media Co. Revisited:

An Assessment Of The Case's Impact So Far

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Abstract

A review of 22 First Amendment cases citing *Cohen v. Cowles Media Co.* shows federal and state courts still working through implications of the case. Damage awards have been upheld even when journalists inadvertently broke promises of confidentiality. However, *Cohen* did not allow enforcement of confidentiality when a source's identity was public, or when the source failed to make clear conditions of a promise. Arguments that *Cohen* provides novel restrictions on First Amendment freedoms have been rejected. However, *Cohen* may have implications for undercover reporting techniques.

Introduction

When the U.S. Supreme court ruled that reporters can be sued for breaking promises to shield the identity of a source, a question of ethics became a matter of law (Alexander, 1993, p.15). This decision allowing courts to determine the ultimate consequences of sensitive editorial decisions was expected to significantly alter established journalistic practices.

Even before the decision in *Cohen v. Cowles Media Co.* (1991), there were predictions that the case signaled a need for journalists to reconsider their use of anonymous sources (Horvath-Neimeyer, 1990). After the decision, there were predictions that it would trigger lawsuits (Confidentiality, 1992) along with scholarly arguments about the implications of the case (Alexander, 1993; Harvey, 1992; Youm & Stonecipher, 1992). Meanwhile, courts throughout the United States began applying and interpreting what the Supreme Court had said.

This paper presents a comprehensive review of opinions that cite *Cohen v. Cowles Media Co.* (1991) and related decisions from the case. This review ranges from cases referring to *Cohen* in a footnote to decisions that rest their analysis on the principles established by *Cohen*, and is the basis for an examination of how the case has so far affected the practice of journalism.

The review discusses 27 opinions in 22 cases dealing with First Amendment issues (see chart, Appendix A).[1] These cases include (a) six dealing with promises of confidentiality, (b) one dealing with invasion of privacy, (c) six dealing with defamation, (d) three dealing with regulation of speech, (e) three dealing with subpoenas to journalists, (f) one dealing with illegally obtained information, (g) one dealing with religious freedom, and (h) one dealing with a settlement agreement involving advertising.

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[1] Five other cases citing *Cohen*, four in the area of contract law and one criminal case, are described separately in Appendix B.

Background of the Case

In 1982 a reporter covering the Minnesota governor's race met over a cup of coffee with a public relations executive in the cafeteria of the state Capitol (Salisbury, 1991, p. 20). Dan Cohen, the executive who requested the meeting, offered *St. Paul Pioneer Press* reporter Bill Salisbury damaging information about the Democratic candidate for lieutenant governor. Cohen, a Republican campaign advisor, demanded a promise that he not be named in connection with the story. Salisbury agreed, and Cohen turned over documents showing the Democratic candidate had twice been arrested.

Cohen also gave the documents to Lori Sturdevant, a reporter for *The Star Tribune* of Minneapolis.[2] The records showed that in 1969 the Democratic candidate for lieutenant governor was arrested on three counts of unlawful assembly (*Cohen v. Cowles Media Co.*, 1990, p. 201). The charges were dismissed. The candidate also had a 1970 conviction for petit theft, but the conviction was later vacated.

The records did not explain the circumstances of either arrest. The candidate told reporters the first arrest was during a protest calling for more minority workers on municipal construction projects. The second case occurred when the candidate, upset by her father's recent death, left a store with $6 in sewing materials (*Cohen v. Cowles Media Co.*, 1990, p. 201).

Editors at both newspapers made independent decisions to overrule the reporters' promises of confidentiality. In both newsrooms, the decision to identify Cohen "was the subject of vigorous debate" (*Cohen v. Cowles Media Co.*, 1990, p. 201).[3] Both reporters made strong objections to being forced to break their promise, and Sturdevant had her byline removed from the story.

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[2] Reporters for the Associated Press and WCCO-TV also received the documents (*Cohen v. Cowles Media Co.*, 1989, p. 253). The Associated Press published a story, but did not identify Cohen. WCCO-TV decided not to broadcast the story, thereby keeping its promise of confidentiality.

The next day, both newspapers published stories naming Cohen as the source of the documents (*Cohen v. Cowles Media Co.*, 1990, p. 201-202). The day the articles were published, Cohen was fired from his job at an advertising firm. Cohen could not sue for libel because the information published about him was true. Instead, he filed suit for fraudulent misrepresentation and breach of contract (*Cohen v. Cowles Media Co.*, 1990, p. 202). The suit against Northwest Publications, Inc., which published the *St. Paul Pioneer Press*, and Cowles Media Company, which published the *Star Tribune*, resulted in $200,000 in compensatory damages and $500,000 in punitive damages (p. 199).

Appellate Decisions in the Case

The newspapers appealed the verdict to the Court of Appeals of Minnesota (*Cohen v. Cowles Media Co.*, 1989). The appeals court reversed the finding of fraudulent misrepresentation and set aside the $500,000 in punitive damages. However, the court upheld the award for breach of contract and the $200,000 in compensatory damages.

The case then was appealed to the Minnesota Supreme Court (*Cohen v. Cowles Media Co.*, 1990). The court upheld the dismissal of fraudulent misrepresentation because both reporters had intended to keep their promises[4] and therefore did not fraudulently persuade Cohen to turn over the information. However, the court disagreed with the finding that Cohen had a valid contract claim.

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[3] Some staffers argued the promise of confidentiality should be honored, while others suggested Cohen be identified as a source close to the Republican campaign (*Cohen v. Cowles Media Co.*, 1990, p. 201). Still others argued against publication saying the story was not newsworthy. Editors responded that a veiled reference to a source would cast suspicion on others close to the campaign. In addition, the story was spreading through the media, and could be discovered by reporters using sources that were not confidential. At *The Star Tribune* the newspaper's editorial endorsement of the Democratic ticket also raised concern that not publishing the story would result in accusations of favoritism.

The Minnesota Supreme Court said the agreement with Cohen had all the elements of a contract--"an offer, an acceptance, and consideration"(*Cohen v. Cowles Media Co.*, 1990, p. 202). However, the court added that an offer of confidentiality to a source was a question of journalistic ethics,[5] not a matter of law. The court said that every exchange of promises is not considered binding because no contract exists unless that is what both parties intend, and ruled Cohen's contract claim invalid (p. 203).

However, the Minnesota Supreme Court also considered whether to apply the doctrine of promissory estoppel, which can imply a lawful contract even if none has been established. The court explained: "According to the doctrine, well-established in this state, a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise" (*Cohen v. Cowles Media Co.*, 1990, p. 203-204).

The Minnesota Supreme Court said the first two elements of promissory estoppel were present in the case. First, the reporters, expecting documents in return, promised Cohen he would remain anonymous. Second, the promise induced Cohen to hand over the documents and he suffered a resulting detriment (*Cohen v. Cowles Media Co.*, 1990, p. 204).

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[4] The court noted that Cohen admitted the reporters intended to keep their promises (*Cohen v. Cowles Media Co.*, 1990, p. 202). In addition, there was no evidence the editors planned to name Cohen until after the promise was made and additional information about the story was discussed.

[5] The court noted that it might be ethical to break such a promise if (a) disclosure was needed to correct a source's misstatements, or (b) failing to reveal the source could result in substantial damages for libel (*Cohen v. Cowles Media Co.*, 1990, p. 203).

However, the Minnesota Supreme Court said the third element--requiring enforcement of the promise to prevent injustice--depended on whether there were valid First Amendment reasons to balance against the decision to break the promise. A critical factor was that the promise was made to a political source in a political campaign. "The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms" (*Cohen v. Cowles Media Co.*, 1990, p. 205). The court concluded that to protect the First Amendment, parties to such agreements must rely only on their trust in each other.

Two of the Minnesota justices dissented, arguing that Cohen deserved damages either for beach of contract or under the promissory estoppel theory. The decision, the dissenters argued, misused the First Amendment by allowing newspapers to avoid liability for breaking a promise. "The result of this is to carve out yet another special privilege in favor of the press that is denied other citizens" (*Cohen v. Cowles Media Co.*, 1990, p. 205).[6]

The case then was appealed to the U.S. Supreme Court (*Cohen v. Cowles Media Co.*, 1991). The Supreme Court reversed the decision vacating the award for breach of contract, and remanded the case to the Minnesota Supreme Court.

The U.S. Supreme Court first addressed the question of whether it should consider the constitutional implications of the case because the theory of promissory estoppel was not raised until the case reached the Minnesota Supreme Court[7] and because the lower court decision rested on an interpretation of state law (*Cohen v. Cowles Media Co.*, 1991, p. 2275). The U.S. Supreme Court rejected both arguments as irrelevant because the decision not to enforce promissory estoppel was based on a finding that enforcement would violate the First Amendment.

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[6] The dissent called the decision "unconscionable" (*Cohen v. Cowles Media Co.*, 1990, p. 206), saying it allowed the press to use confidentiality to shield the identity of its sources while violating "confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable" (p. 206).

[7] The promissory estoppel argument did not appear in briefs filed with the Minnesota Supreme Court, but was raised in oral arguments before the court (*Cohen v. Cowles Media Co.*, 1990, p. 204).

The U.S. Supreme Court stated that consideration of whether the constitution prevents state courts from enforcing a promise of confidentiality would be controlled by the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"(*Cohen v. Cowles Media Co.*, 1991, p. 2276).[8] The court noted that these cases require the press to acquire legally information for publication. The press has no special privilege that allows it to break the law, or infringe on other people's rights.

The U.S. Supreme Court held that Minnesota's promissory estoppel doctrine "is a law of general applicability" (*Cohen v. Cowles Media Co.*, 1991, p. 2276). The court explained that the law applies to all citizens equally without singling out the press.

The U.S. Supreme Court added that upholding the compensatory damage award would not punish the newspaper for publishing legally obtained information. Rather, the award was "constitutionally indistinguishable from a generous bonus paid to a confidential news source" (*Cohen v. Cowles Media Co.*, 1991, p. 2276). The court added that it was not clear the newspapers legally obtained Cohen's name for purposes of publication because they made a promise they failed to honor (p. 2276-2277).

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[8] Cases cited by the court (*Cohen v. Cowles Media Co.*, 1991 p. 2276) included (a) *Branzburg v. Hayes* (1972, 408 U.S. 665) which held reporters are not immune from answering questions in criminal investigations in response to a grand jury subpoena, (b) *Zacchini v. Scripps-Howard Broadcasting Co.* (1977, 433 U.S. 562), which held the press must obey copyright laws, (c) *Associated Press v. NLRB* (1937, 301 U.S. 103) which held the press must obey federal labor laws, (d) *Associated Press v. United States* (1945, 326 U.S. 1) *and Citizen Publishing Co. v. United States* (1969, 394 U.S. 131) which held the press was not immune to antitrust laws, and (e) *Murdock v. Pennsylvania* (1943, 319 U.S. 105) and *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* (1983, 460 U.S. 575) which established the press is not immune from nondiscriminatory taxes.

The U.S. Supreme Court also held that reinstatement of the damage award did not involve state action intended to control the content of newspapers by enforcing a penalty for publication.[9] Both parties agreed to take on legal obligations, and "any restrictions which may be placed on the publication of truthful information are self-imposed" (*Cohen v. Cowles Media Co.*, 1991, p. 2276).[10]

The U.S. Supreme Court noted that Cohen did not try to use promissory estoppel to avoid the legal requirements for establishing a libel claim. The damages sought were for breach of contract, not injury to reputation (*Cohen v. Cowles Media Co.*, 1991, p. 2277).

However, the U.S. Supreme court declined to reinstate the $200,000 damage award, saying the Minnesota Supreme Court must decide whether Cohen had met the state's legal standard for establishing a promissory estoppel claim. The U.S. Supreme Court noted that Minnesota's constitution might be interpreted as shielding the press from a promissory estoppel claim, and remanded the case for further action (*Cohen v. Cowles Media Co.*, 1991, p. 2277).

The Minnesota Supreme Court reconsidered the case in *Cohen v. Cowles Media Co.* (1992). The court ruled that Cohen had established the elements of promissory estoppel, and reinstated the $200,000 damage award resulting from the broken promise.

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[9] Dissenting opinions argued that the state should not be allowed to punish publication of truthful information unless the state has an interest of the "'highest order'" (*Cohen v. Cowles Media Co.*, 1991, p. 2277). The dissents argued for the balancing test applied by the Minnesota Supreme Court, stating that the First Amendment prohibits government from limiting the information available to the public. Public interest in information about a political campaign meant that publication of Cohen's name should receive Constitutional protection (p. 2277-2280).

[10] The court rejected arguments that upholding the award would inhibit reporting of a source's identity when the identity becomes newsworthy. Such an effect "is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them" (*Cohen v. Cowles Media Co.*, 1991, p. 2277).

The Minnesota Supreme Court rejected the newspapers' argument that a free press provision in Minnesota's constitution provided broader protection than the First Amendment. Therefore, nothing in the state constitution barred Cohen's claim (*Cohen v. Cowles Media Co.*, 1992, p. 390-391).

The Minnesota Supreme Court then turned to the question of promissory estoppel. The court stated that once a promise is made and the expected action takes place, the deciding whether the promise must be enforced to prevent injustice becomes a question of law. Such questions are decided by courts. The court stated, "What is significant in this case is that the record shows the defendant newspapers themselves believed that they generally must keep promises of confidentiality given a news source" (*Cohen v. Cowles Media Co.*, 1992, p. 391). The court then held that the importance of honoring promises of confidentiality meant the resulting harm to Cohen required a remedy to prevent injustice.

Legal Implications of the Case

Application of Contract Law

The Minnesota Supreme Court's first decision in *Cohen v. Cowles Media Co.* (1990, p. 202*)* identified three elements of a contract as (a) an offer, (b) acceptance, and (c) consideration. Black's (1979) defines each of these elements. An offer is proposing to do something, or manifesting the willingness to enter into a bargain (p. 76). Acceptance of the contract offer is defined as compliance with the terms and conditions of the offer that was made (p. 12). A consideration is the motive, or inducement for agreeing to the contract (p. 277). This can take the form of a benefit received by someone, or the agreement to forgo some legal right.

A contractual promise can be oral (Griffith & Reiser, 1991, p. 36-38). The key question is whether there was "mutual assent" (p. 38) to the terms of the promise. In addition, a promise is only a contract when it becomes legally enforceable (p. 24-26).

One legal doctrine that can be used to enforce a promise is estoppel. This doctrine prevents someone from causing injury by misleading others about actions the individual plans to take (Ludes & Gilbert, 1964, p. 289).

The law of estoppel can be applied to provide restitution when a contract is breached (Friedman, 1981, chap. 2). Restitution is sought when someone suffers a loss because of the bargain they made.[11] The special remedy of promissory estoppel offers restitution when someone relies on a promise to their detriment.[12]. This doctrine allows enforcement of the promise when necessary to avoid an injustice, even if there was no consideration involved (p. 106). That is because under promissory estoppel the remedy is based on the extent to which the promise was relied upon, not on the terms of the promise.

According to Alexander (1993, p. 10) the application of promissory estoppel requires a finding that three elements are present. First, there must be a promise that someone actually relied upon. Second, the person relying on the promise must have had a reason to expect that they could. Third, the only way to avoid an injustice is by enforcing the promise.

Alexander (1993, p. 10) described how the decision in *Cohen* turned on the third element of this test. The Minnesota Supreme Court balanced enforcement of the promise to Cohen against free press rights, concluding that enforcement would violate the newspapers' rights.

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[11] This differs from expectation damages, which provide a remedy by attempting to place someone in the same position they would have achieved if the contract was fulfilled (Friedman, 1981, p. 52).

[12] Black's (1979, p. 406) defines a detriment as (a) the forbearance of a legal right, or (b) giving up something an individual has a right to keep, or (c) doing something an individual has a right not to do.

However, the U.S. Supreme Court rejected the argument that applying promissory estoppel would violate the First Amendment.

Successful application of the three-part test for promissory estoppel can be expected to result in damage awards that are intended to restore the injured party to the position he or she would have been in if no contract was made (Alexander, 1993, p. 11). This means the U.S. Supreme Court decision in *Cohen* offers sources a legal weapon when journalists or news organizations break promises of confidentiality (p. 15).

A Potential Basis for Privacy Actions

Another commentator argues the U.S. Supreme Court decision in *Cohen* has important implications for the development of legal theory. Harvey (1992) contends that *Cohen* is part of a line of cases suggesting a way to revive what he calls the dead tort for invasion of privacy. Currently, invasion of privacy suits against the press require balancing the vague elements of privacy against free press rights. First Amendment rights are so highly valued that privacy interests inevitably lose, Harvey contends.

Cohen, however, is an example of a case where the question at issue was a breach of a confidence, not an invasion of privacy. Harvey (1992) argues that an effective privacy tort, modeled after English law, would be based on a requirement to keep promises not to disclose private facts. That way questions of responsibility, and resulting lawsuits, would focus on the person who made the disclosure, not on the constitutionally-protected press.

Possible Effects on Journalistic Practice

Commentators disagree about how *Cohen* ultimately will affect journalistic practice. Alexander (1993, p. 10) argues that lower courts might reintroduce a balancing test or limit the enforcement of promises to sources by applying other limitations on the enforcement of contracts. For instance, he points out that misrepresentation, fraud, threats, questions about capacity, and undue influence all can limit enforcement of a contract.

However, Youm and Stonecipher (1992, p. 64) argue that the U.S. Supreme Court made its *Cohen* decision when some journalists were questioning traditional commitments to keep promises of confidentiality. Journalists have gone to jail to keep such promises. Youm and Stonecipher explained that journalists viewed confidentiality as an ethical responsibility that was vital to persuading potential sources to come forward with information. Journalists also regarded such promises as a way to maintain their independence and ability to investigate government. However, when *Cohen* was decided some journalists had begun to disregard such promises, arguing that public interest demanded disclosure of the source of information.

Youm and Stonecipher (1992, p. 85-88) argue that in *Cohen* the U.S. Supreme Court gave short shrift to the fact that reporters' promises to sources are made against a complex backdrop of subtle or implied understandings. The traditional explicit conditions and assurances found in commercial contracts are rarely present. The decision also failed to define the so-called incidental effect upon the press from enforcing such promises. Instead, Youm and Stonecipher argue, *Cohen* throws questions of enforcement back to the states where courts considering whether promises are enforceable contracts may reject any presumption in favor of the press.

Methodology

This paper, acknowledging the importance of the case and the debate that it provoked, represents an examination of the effects to date of the U.S. Supreme Court decision in *Cohen*.. The examination is based on a review of all cases citing *Cohen* that are listed in relevant editions of *Shepard's United States Citations* and the most recent available supplements. A search of citations was conducted using *Cohen v. Cowles Media Co.* (1991) as the starting point. As of mid-March, the search produced cites in three volumes (*Shepard's* 1994; *Shepard's*, 1995; *Shepard's* 1996). The case also was Shepardized using the LEXIS database. The opinions found during this search are the basis for this paper.

The search produced a total of 32 opinions in 27 cases where *Cohen* has been cited (see chart, Appendix A). The cases can be broadly divided into 22 that deal with First Amendment issues, four cases in the area of contract law and one criminal case. The contract and criminal cases are described separately in Appendix B.

First Amendment Cases

Six of the First Amendment cases involve promises of confidentiality that journalists gave to their sources. In five of those cases, the promise was a central issue and in the sixth case it prompted a significant legal argument. In three cases, decisions resulted from analyses based almost entirely on *Cohen.*

The First Case Based on Cohen

In *Anderson v. Strong Memorial Hospital* (1991) the Supreme Court of New York[13] held a newspaper liable for breaking its promise to conceal the identity of an HIV patient. The opinion relied on the U.S. Supreme Court's *Cohen* decision.

Cornell Anderson was identified by friends and family from a photograph published by the Gannett Company, Inc.'s *Democrat & Chronicle* in Rochester, NY. A reporter and photographer had promised that Anderson would not be identified. The photograph of a doctor examining Anderson was published with a cutline that identified Dr. William Valenti of Strong Memorial

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[13] This is a trial, not an appellate, court.

Hospital's Infectious Disease Unit examining a patient. The cutline stated, ' "Valenti's chief responsibility is caring for AIDS patients' " (*Anderson v. Strong Memorial Hospital*, 1991, p. 830). At that time Anderson was HIV positive, but he did not have AIDS.

Anderson sued the hospital and doctor for breaching their confidential relationship with a patient. Anderson subsequently died, but his estate was awarded damages of $35,000. The doctor and hospital then filed a third-party suit against the newspaper arguing that it should either contribute to or cover the cost of the damages (*Anderson v. Strong Memorial Hospital*, 1991, p. 830). The Supreme Court of New York ruled that the U.S. Supreme Court decision in *Cohen* allowed such lawsuits under the First Amendment.

The Supreme Court of New York then turned to the question of whether the state's constitution might block such a suit. The court noted that New York's constitution has been interpreted to grant broader press protection than the First Amendment. However, the court held that "there is no strong public interest in knowing the identity of someone who is HIV positive or suffering from AIDS" (*Anderson v. Strong Memorial Hospital*, 1991, p. 831). Referring to state law and court decisions, the ruling explained that public policy created a state interest in keeping confidential the identity of such patients.

The Supreme Court of New York added that the U.S. Supreme Court decision in *Cohen* meant "an unkept promise to a news source makes the press' conduct unlawful" (*Anderson v. Strong Memorial Hospital*, 1991, p. 832). The New York court compared the newspaper's conduct to a television photographer entering someone's home without permission.

The newspaper had voluntarily agreed not to identify Anderson, the Supreme Court of New York said. "It would be illogical and legally incongruous to hold that Valenti and Strong are responsible for the broken promise made to the plaintiff but that Gannett, the promisor, is not" (*Anderson v. Strong Memorial Hospital*, 1991, p. 832).

The Supreme Court of New York court added that the newspaper had commented in an editorial on the U.S. Supreme Court's *Cohen* decision that the First Amendment does not allow the press to lie about its promises. The court quoted the editorial's assertion that, ' "If people didn't trust us, they wouldn't tell us anything. Then we couldn't print the truth, and you couldn't read it' " (*Anderson v. Strong Memorial Hospital*, 1991, p. 833).

The Second Case Based on Cohen

Another case that relied on the U.S. Supreme Court's *Cohen* decision was *Ruzicka v. Conde Nast Publications, Inc.* (1991). In this case, the U.S. Court of Appeals for the Eighth Circuit[14] ordered a district court to apply the promissory estoppel test when deciding whether a woman could recover damages because a magazine allegedly broke its promise not to identify her in a published article.

Jill Ruzicka filed the suit after *Glamour* magazine published a story describing her history of sexual abuse by a psychiatrist. Ruzicka had agreed to be interviewed so long as she could not be identified from the article. The story identified her as ' "Jill Lundquist" ' (*Ruzicka v. Conde Nast Publications, Inc.*, 1991, p. 580). The article included accurate details of her background, including the fact that Ruzicka was a Minneapolis attorney who had sued the psychiatrist who abused her. The article also explained she had served on a state task force that helped write a law making sexual exploitation by therapists a crime. Ruzicka argued that two of her former therapists identified her from the article, but admitted that both were familiar with the details of her background.

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[14] Federal courts had jurisdiction because this case involved diversity of citizenship. In *Ruzicka v. Conde Nast Publications, Inc. (1991)* the plaintiff lived in Minnesota, but the defendants lived n New York. The agreement at issue was made in Minnesota, and the federal courts applied Minnesota law to the case.

A U.S. District Court dismissed a claim for breach of contract filed by Ruzicka,[15] and the U.S. Court of Appeals upheld that decision. However, the appeals court agreed to consider a promissory estoppel claim that Ruzicka raised on appeal (*Ruzicka v. Conde Nast Publications, Inc.*, 1991, p. 582).

The U.S. Court of Appeals pointed out that the U.S. Supreme Court's *Cohen* decision was made after Ruzicka began her appeal of the district court rulings in the case. The appeals court stated that it would be "somewhat incongruous" (*Ruzicka v. Conde Nast Publications, Inc.*, 1991, p. 583) not to let Ruzicka press a promissory estoppel claim after Cohen was allowed to pursue a similar claim although it was never formally made. Ruzicka's suit was remanded to the district court for a decision on the merits of the promissory estoppel claim (p. 583).

However, in *Ruzicka v. Conde Nast Publications, Inc.* (1992) the U.S. District Court for the District of Minnesota, Fourth Division, rejected the promissory estoppel claim and granted Conde Nast's motion for summary judgment.[16]

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[15] This ruling was made after *Cohen* reached the Court of Appeals of Minnesota and before it reached the Minnesota Supreme Court for the first time. The U.S. District Court, referring to the Minnesota appeals ruling that *Cohen* could sue for breach of contract, held the First Amendment required proof of a confidentiality agreement stated in "specific and unambiguous terms" (*Ruzicka v. Conde Nast Publications, Inc.*, 1991, p. 581) before a breach of contract claim could prevail. The court ruled that Ruzicka did not prove such an agreement existed, and granted summary judgment against her. Other claims under Minnesota state law also were dismissed.

[16] Summary judgment is granted only if there is no genuine dispute about any material fact (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 305). However, the party opposing summary judgment must specify why it believes there is an issue that requires proceeding to trial. When considering a request for summary judgment, the court must view the evidence as most favorable to the party that did not make the request, and it must give that party the benefit of all reasonable inferences that can be based upon the facts of the case. However, summary judgment must be granted against a party if it fails to establish an essential element of its case, an element that it would be required to prove at trial.

The U.S. District Court first considered whether the promise of confidentiality was clear and definite. This was the standard adopted by the Minnesota Supreme Court after *Cohen* was remanded from the U.S. Supreme Court. The U.S. District Court said the clear and definite standard was stricter than the standard of "reasonable certainty" (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 308) required under contract theory. The district court held that the promise Ruzicka would not be identifiable was less definite than the promise to Cohen that he would not be identified at all.

The U.S. District Court, quoting from its first decision in the case, reasoned that:

> ...a promise of unidentifiability raises difficult questions of definition and interpretation, because 'just what will make a private figure identifiable depends on the information known by that person's friends and acquaintances. A reporter, for the most part, cannot know what information will threaten the anonymity of a source unless the source specifies what facts should not be published (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 308).[17]

The U.S. District Court concluded the promise to shield Ruzicka's identity was not sufficiently clear to meet the promissory estoppel standard (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 309)

The U.S. District Court did state that Ruzicka had produced evidence of stress and lost earnings resulting from publication of the article. Therefore, there was a genuine question whether Ruzicka had relied on the promise to her detriment (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 310). However, the district court concluded it was not necessary to enforce the promise to prevent an injustice. The court said the "defendants...attempted to mask plaintiff's identity, but, in plaintiff's opinion, failed to accomplish their goal" (p. 311). Cohen, however, was identified because of a deliberate breach of a promise, the district court said. The district court concluded that enforcing the promise to Ruzicka "could create injustice by placing on editors and reporters the impossible burden of guessing at what steps such a promise requires. Therefore, the Court holds that plaintiff cannot satisfy the third element of a promissory estoppel claim" (p. 311).

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[17] The reporter had complied with a specific request from Ruzicka not to publish details of Ruzicka's problems at a previous job (*Ruzicka v. Conde Nast Publications, Inc.*, 1992, p. 304).

Ruzicka appealed the ruling and the U.S. Court of Appeals for the Eighth Circuit reversed the district court, remanding the case for plenary trial[18] (*Ruzicka v. Conde Nast Publications, Inc.*, 1993). The appeals court said the district court was mistaken when it used a ' "clear and definite" ' (p. 1321) standard to examine the promise made by *Glamour*. The appeals court said that Minnesota law, including decisions involving the *Cohen* case, established the use of a flexible standard under promissory estoppel. This standard only requires a showing that ' "the promisor should reasonably have expected its promise to induce another's detrimental action' "(p. 1321) and is therefore less formal than the rules of offer and acceptance governing contract theory. However, the appeals court added that the reporter's promise to Ruzicka was clear enough to comply with the strictest standard (p. 1321).

The U.S. Court of Appeals held the promise was clearly intended to mean "a reasonable reader could not identify Jill Ruzicka by factual description" (*Ruzicka v. Conde Nast Publications, Inc.*, 1993, p 1321). The appeals court added that Ruzicka's claim was not based on disclosure of facts she voluntarily provided for publication (p. 1322). The claim instead was based on references to her as an attorney who served on the task force on therapist-patient sex. Ruzicka claimed these identifying facts were discovered independently by the reporter.

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[18] A plenary trial is a complete and formal proceeding, as opposed to a summary hearing on a case (Black's, 1979, p. 1038).

The U.S. Court of Appeals stated that "the elements of promissory estoppel are fact dependent, they necessarily involve fact-finding and require inquiry into the circumstances surrounding the making of the promise and the promisee's reliance" (*Ruzicka v. Conde Nast Publications, Inc.*, 1993, p. 1322) on those circumstances. Therefore, the case was remanded to the U.S. District Court for a plenary trial to determine whether, in fact, the promise existed and Ruzicka relied upon the promise.

However, the U.S. Court of Appeals added that the third element of promissory estoppel, whether failure to enforce the promise would result in an injustice, was a matter of law (*Ruzicka v. Conde Nast Publications, Inc.* , 1993, p. 1323). The appeals court--citing the Minnesota Supreme Court's *Cohen* decision after remand from the U.S. Supreme Court--concluded the promise to Ruzicka should be enforced to prevent injustice unless Conde Nast could demonstrate a compelling need to break the promise (p. 1323). The appeals court noted that Ruzicka told the reporter she was a victim of incest, a fact never made previously public, after obtaining the promise not to be identified. In addition, a draft of the article that Ruzicka approved did not include the details that she claimed had identified her.

The Third Case Based on Cohen

In *Morgan v. Celender* (1992) the U.S. District Court for the Western District of Pennsylvania[19] rejected a claim of fraud and invasion of privacy resting partly on the U.S. Supreme Court's *Cohen* decision. Diane Morgan Chambon sued the Gannett Publishing Corp. and the *Valley News Dispatch* after the newspaper published a photograph of Chambon with her daughter, who allegedly had been sexually abused by a former police chief. Chambon claimed

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[19] This was a diversity case tried under Pennsylvania law (*Morgan v. Celender*, 1992, p. 308).

The fraud claim, which was based on the U.S. Supreme Court's decision in *Cohen*, was dismissed for lack of evidence. The U.S. District Court added that even if a promise of confidentiality was made and broken, that did not constitute fraud[20] under Pennsylvania law (*Morgan v. Celender,* 1992, p. 311). The district court said the Supreme Court's *Cohen* decision only established the possibility of prevailing in a suit for promissory estoppel. The district court added that before *Cohen* reached the Supreme Court, "the Minnesota Court of Appeals held that the breach of the agreement by the newspaper did not establish a cause of action for fraudulent misrepresentation" (*Morgan v. Celender,* 1992, p. 311). That decision was subsequently upheld by Minnesota's supreme court.

The U.S. District Court dismissed Chambon's invasion of privacy claim because the facts published in the interview and photograph were part of the public record in legal proceedings against the former police chief (*Morgan v. Celender*, 1992, p. 309-310). Accusations that a minor was abused by a police officer are a matter of legitimate public concern, the district court concluded.

The U.S. District Court stated that Chambon herself had released the information to others besides the reporter. The court stated, "it matters not, in our judgment, that the information and photograph may have been obtained illegally, unethically or deceptively by the reporter" (*Morgan v. Celender,* 1992, p. 310).[21] Chambon had not established any facts that should be considered by a jury in regard to the privacy claim.

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[20] The elements of fraud in Pennsylvania were (a) misrepresentation, (b) a fraudulent utterance, (c) an intention by the maker that the recipient will be induced to act, (d) justifiable reliance on the misrepresentation; and (e) damage to the recipient as a proximate result (*Morgan v. Celender*, 1992, p. 309).

[21] The ruling on the privacy claim also stated that "the news media has the right to publish such items, even if a reporter promises that such additional facts, not of record, would be 'off the record.' The law provides that anyone who desires to discuss matters of public concern with a reporter does so at his or her peril that the matter may be published" (*Morgan v. Celender*, 1992, p. 310).

Other Confidentiality Cases Citing Cohen

The remaining three cases involving promises of confidentiality include a case that arose from a signed contract between a filmmaker and a source. In *Wildmon v. Berwick Universal Pictures* (1992) the U.S. District Court for the Northern District of Mississippi rejected a claim for breach of contract involving an interview for a documentary film. Donald Wildmon of the American Family Association sued to stop U.S. distribution of a British film that included an interview with Wildmon and depictions of art he objected to such as Andres Serrano's "Piss Christ"--which shows a Crucifix submerged in urine--and photographs by Robert Mapplethorpe.

The lawsuit was based on a signed agreement between Wildmon and the film's producer. The agreement stated that Wildmon's interview would not be given to sexually-oriented magazines or to any other media outlet without written permission from the American Family Association (*Wildmon v. Berwick Universal Pictures* , 1992, p. 1171). The agreement also covered outtakes from the interview.

Wildmon filed suit after learning the film, which had been broadcast in Europe, was slated to be shown in the United States.[22] The suit contended distribution of the film without Wildmon's permission would be a breach of contract. However, the U.S. District Court concluded the agreement was ambiguous (*Wildmon v. Berwick Universal Pictures,* 1992, p. 1174-1175). The agreement could be interpreted as preventing distribution of the interview anywhere except as part of the film's broadcast in Great Britain. However, the agreement also could be read as *only* preventing distribution of the Wildmon footage for use in other productions. The district court said that contract law requires that the interpretation of ambiguous agreements should lean against the person who drafted them--in this case Wildmon. The district court held that Wildmon should have clearly stated his intentions if he wanted to ensure the film was viewed only by British audiences without his permission (p. 1177).

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[22] The film was selected to open the Margaret Mead Film Festival at New York's American Museum of Natural History in 1991 (*Wildmon v. Berwick Universal Pictures,* 1992, p. 1174).

The U.S. District Court said that under the U.S. Supreme Court's *Cohen* decision, there was no limit to Wildmon's contractual rights just because the film was produced for public viewing (*Wildmon v. Berwick Universal Pictures*, 1992, p. 1177). However, the district court added, "Cohen does not relieve a drafter of the responsibility of making the contract clear" (p 1178).

A Promise to an AIDS Patient.

Another case is *Multimedia WMAZ, Inc. v. Kubach* (1993) where the Court of Appeals of Georgia sustained a jury's award of $500,000 in damages to a man with AIDS who sued a television station for invasion of privacy. The suit was based on a mistake in setting the level of digitization, which resulted in the man being identifiable during a live broadcast. The station, which promised to conceal the man's identity, corrected the problem after 7 seconds.[23]

The Court of Appeals of Georgia held the man did not waive his right to privacy when he told friends he had AIDS and when he appeared on another television show where his identity was concealed (*Multimedia WMAZ, Inc. v. Kubach,* 1993, p. 493-495). The appeals court also rejected an argument that the disclosure was protected because it concerned a matter of public interest. The appeals court said that the U.S. Supreme Court's C*ohen* decision means the First

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[23] The plaintiff stayed home after the broadcast, fearing he would be recognized as an AIDS patient. When his sister persuaded him to go out for fast food, he was recognized and harassed (*Multimedia WMAZ, Inc. v. Kubach,* 1993, p. 493). He also quit a job at a dry cleaner because he felt unable to deal with the public.

Amendment does not prohibit recovering damages for failing to conceal an AIDS patient's identity when the station promised not to identify him.

The Court of Appeals of Georgia did vacate a punitive damage award of $100[24] (*Multimedia WMAZ, Inc. v. Kubach,* 1993, p. 495-496). However, the appeals court rejected other arguments that the trial court had erred by (a) dismissing potential jurors who expressed bias against homosexuals, (b) allowing the jury to consider the patient's lost wages from a dry cleaning job, and (c) ruling that damage to reputation is not necessary to prove invasion of privacy.

Protecting an AIDS Patient's Privacy.

The last case involving promises to conceal a source's identity is *Doe v. Shady Grove Adventist Hospital* (1991) where the Court of Special Appeals of Maryland issued an order protecting the identity of a dying AIDS patient. The patient sued the hospital for invasion of privacy because staff members allegedly gave the patient's family and friends confidential information about his condition. The special appeals court was asked to determine if the suit should be tried in an open courtroom. The court attempted to balance the patient's privacy interests against previous findings that trials should be public. The special appeals court issued an order redacting the patient's name from records in the case, and forbidding use of his name during open proceedings.

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[24] A dissenting opinion argued that the actual damage award of $500,000 was tainted because the jury considered punitive and actual damages at the same time (*Multimedia WMAZ, Inc. v. Kubach,* 1993, p. 497-500). The dissent argued the size of the award as compared with the $100 for punitive damages indicated the jury had combined punitive and actual damages. Therefore, the award should be reconsidered.

The Court of Special Appeals cited the U.S. Supreme Court's *Cohen* decision as a basis for rejecting arguments that the patient waived[25] his right to privacy by granting interviews to newspapers and television stations (*Doe v. Shady Grove Adventist Hospital*, 1991, p. 514- 515). The patient had granted the interviews only after demanding anonymity, and none of the journalists revealed his name. The special appeals court said *Cohen* made such promises enforceable, so there was no waiver of the patient's right to conceal his identity.

An Invasion of Privacy Suit

The *Cohen* case also was mentioned in a privacy suit that did not involve a promise of confidentiality. In *Scheetz v. Morning Call* (1991) the U.S. Court of Appeals for the Third Circuit upheld the dismissal of an invasion of privacy suit filed by a police officer and his wife. The couple sued the *Morning Call* of Allentown, PA., for publishing an article detailing an incident where the officer struck his wife. The article based its description of the incident on confidential police reports obtained by a reporter. The reporter obtained the documents after the local police chief named officer Kenneth Scheetz " 'Officer of the Year' "(p. 204).

The U.S. Court of Appeals affirmed dismissal of the suit because the officer's wife reported the incident to police, so she could not "reasonably expect the information to remain secret" (*Scheetz v. Morning Call,* 1991, p. 207). The ruling stated that police did not need her consent to press charges, so information in the confidential reports did not have constitutional privacy protection.

A dissent argued that the Scheetzes did have a constitutional privacy interest, and also cited the U.S. Supreme Court's *Cohen* decision (*Scheetz v. Morning Call,* 1991, p. 212-213).

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[25] The court, quoting from Black's Law Dictionary, described a waiver as the ' "intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right' " (Doe v. Shady Grove Adventist Hospital, 1991, p. 514-515).

The dissenting U.S. Court of Appeals judge argued that *Cohen* "hinted" (p. 213) at a requirement that reporters must lawfully obtain truthful information. The dissent argued a reporter's possession of information contained in confidential police reports raised questions about whether the information was legally obtained.

Defamation Cases Citing Cohen

There are six defamation cases citing Cohen. Two of the cases involve the use of hidden cameras and surreptitious reporting techniques. The first case is *Food Lion Inc. v. Capital Cities/ABC, Inc.* (1995), where the U.S. District Court for the Middle District of North Carolina acted on a defense motion to dismiss allegations of criminal conduct including racketeering, trespass and fraud. The Food Lion grocery chain sued for damages and for injuries to its reputation after a story was broadcast on the ABC news program *Prime Time Live*. The broadcast reported on sanitary practices in Food Lion stores, and included footage from hidden cameras taken by ABC employees that the grocery chain hired under false pretenses. The journalists, aided by a union attempting to organize the grocery chain, had concocted employment histories and references that enabled them to get Food Lion jobs.

The U.S. District Court dismissed Food Lion's complaints alleging the news organization violated federal RICO laws while engaging in mail and wire fraud. The district court said the acts did not constitute a pattern of offenses as defined by RICO laws (*Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995, p. 820). The district court also adopted a magistrate's recommendation to dismiss a claim that *Prime Time Live* violated federal wiretap laws. However, other claims of fraud, trespass, and civil conspiracy were allowed to stand.[26]

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[26] The U.S. District Court deferred consideration of motions to dismiss Food Lion's claims of negligent supervision, breach of fiduciary duty and constructive fraud, and unfair and deceptive trade practices (*Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995). A motion to dismiss a claim of respondeat superior, which Black's (1979, p. 1179) defines as making the employer liable for the acts of an employee, also was deferred.

The U.S. District Court said the U.S. Supreme Court's *Cohen* decision allowed Food Lion to recover damages for violations of laws on trespass, fraud, and North Carolina's statute on unfair and deceptive trade practices (*Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995, p. 821-824). The district court said these are generally applicable laws which do not single out the press. However, the district court added that *Cohen* distinguishes the kind of damages that can be collected for violations of laws of general application--Food Lion could only recover for non-reputational damages. Food Lion doesn't dispute the truth of the information that was broadcast, so it cannot recover for damages to its reputation, the district court said.

The U.S. District Court added that it believed Food Lion was "at least in part, attempting to recover for injury to its reputation while staying clear of the strict requirements of a defamation claim" (*Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995, p. 823). Therefore, Food Lion was required to establish the broadcast was false and made with actual malice before it could recover any damages to its reputation.[27]

The suggestion that Cohen allows recovery of damages from journalists who use undercover techniques also was made in the second case, *Desnick v. American Broadcasting Companies, Inc.* (1995). In this case, the U.S. Court of Appeals for the Seventh Circuit allowed a doctor to proceed with a libel suit based on a broadcast of the ABC 's *Prime Time Live*. However, the appeals court dismissed the doctor's claims of trespass, invasion of privacy, violation of wiretap laws and fraud.

The case arose from an investigation of the Desnick Eye Center, which has offices in four states where more than 10,000 cataract operations are performed each year *(Desnick v. American*

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[27] The U.S. District Court said Food Lion must meet the libel standard established in *Hustler Magazine v. Falwell* (1988, 485 U.S. 46). This case requires public figures to establish elements of a constitutional libel claim (*Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995, p. 823).

Broadcasting Companies, Inc., 1995, p. 1347). Many of the operations involve elderly people. The broadcast alleged that decisions in the clinic were driven by profit at the expense of patient well being (p. 1349-1351). The U.S. Court of Appeals said an allegation in the broadcast that examining machines were rigged to indicate that patients had cataracts might be libelous, and remanded the claim for trial.

However, the U.S. Court of Appeals ruled the use of hidden cameras by journalists posing as patients did not constitute trespass, invasion of privacy, or violation of wiretapping laws (*Desnick v. American Broadcasting Companies, Inc.*, 1995, p. 1352-1353). The court of appeals said the taping took place in offices open to the public, and only revealed information relevant to questions about how the clinic conducted its business.

The U.S. Court of Appeals also dismissed a claim that journalists fraudulently promised not to use hidden cameras because Illinois law only provides remedies for fraudulent promises that "are part of a 'scheme' to defraud" (*Desnick v. American Broadcasting Companies, Inc.*, 1995, p. 1354). The court of appeals said there is no clear distinction between a fraudulent promise and a scheme of such fraud, but added that skepticism, not a lawsuit, was the appropriate remedy in this case. The doctor who owns the clinics should have been aware he could not trust investigative reporters "well known for ruthlessness" (p. 1345).

The U.S. Court of Appeals noted that the U.S. Supreme Court's *Cohen* decision established that the press is not immune from liability for contracts (*Desnick v. American Broadcasting Companies, Inc.*, 1995, p. 1355). The doctor, however, had no legal remedy under state law because the journalists' unscrupulous tactics did not invade such rights.

The third defamation case is *Moldea v. New York Times Co.* (1992) where the U.S. Supreme Court's *Cohen* decision surfaced repeatedly in a lawsuit for libel and invasion of privacy filed by an author who received an unfavorable review. However the case turned on other legal issues.

The U.S. District Court for the District of Columbia rejected a request, based on *Cohen*, to add a claim for breach of contract to the libel suit. The district court said the U.S. Supreme Court's *Cohen* decision only concerned the application of state law to a broken promise of confidentiality. The district court said *Cohen* "in no way affects First Amendment analysis of an individual's libel claim against a media defendant" (*Moldea v. New York Times Co.*, 1992, p. 1).

However, the U.S. Court of Appeals for the District of Columbia subsequently reversed the U.S. District Court's summary judgment in favor of the newspaper on the defamation and invasion of privacy claims (*Moldea v. New York Times Co.*, 1994a). The appeals court said describing as "sloppy journalism" (p. 1326) Moldea's book investigating connections between the National Football League and gambling implied facts that might be proven false. The appeals court said Moldea's claim of libel would turn on whether this accusation was true.

The U.S. District Court of Appeals also reversed the U.S. District Court's ruling that Moldea must demonstrate the publication of private facts to prevail in his claim the review cast him in a false light (*Moldea v. New York Times Co.*, 1994a, p. 1331). The appeals court said a claim of false light depends only on proving the review was published with "reckless disregard" (p.1331) for whether it falsely depicted Moldea in an offensive way. However, the appeals court (p. 1332) added that other cases, including the U.S. Supreme Court's *Cohen* decision, have held that privacy claims cannot be used to avoid the standard of proof required in a libel case.

Then, in *Moldea v. New York Times Co.* (1994b) the U.S. Court of Appeals for the District of Columbia reversed its earlier decision. The appeals court said it mistakenly ignored the fact that the allegedly defamatory statements appeared in a book review. This meant that any statements of opinion based on an interpretation of material in the book could not be considered a basis for a libel action. The appeals court again cited the U.S. Supreme Court's comment in *Cohen* prohibiting the use of privacy actions to avoid the burden of proof required in libel cases (p. 319-320).

The fourth defamation case is *Washington v. Smith* (1995) where the U.S. District Court for the District of Columbia dismissed a libel suit against the publishers of *Dick Vitale's 1993-94 College Basketball Preview*. Marion E. Washington, coach of the Kansas women's team, alleged she was defamed by a comment that her team was talented but she "usually finds a way to screw things up" (p. 61). The district court, applying the standard from *Moldea v. New York Times Co.* (1994b), said underlying facts in the guide could reasonably be interpreted to support the statement about the coach (*Washington v. Smith*, 1995, p. 63-64).

The U.S. District Court also dismissed allegations of invasion of privacy and intentional infliction of emotional distress. The district court cited the U.S. Supreme Court's *Cohen* decision as one of the cases barring the use of related actions to avoid the requirements of libel (*Washington v. Smith*, 1995, p. 64).

The fifth defamation case is *Geick v. Kay* (1992) where the Appellate Court of Illinois for the Second District upheld the dismissal of a former village administrator's libel and privacy suit against the president of the village governing board. The suit alleged the board president violated a separation agreement by making public statements that (a) implied a lack of trust in the former administrator and (b) disclosed the settlement of a sexual harassment suit involving the administrator. The separation agreement promised that no one would make public statements about the circumstances of the administrator's resignation.

The appeals court ruled that the statements by the board president were related to his duties and therefore had absolute privilege.[28] The appeals court rejected an argument that the U.S. Supreme Court's *Cohen* decision barred the defense of privilege (*Geick v. Kay*, 1992, p. 878-879). The appeals court stated that "Cohen certainly has nothing to do with absolute privilege as a defense in a libel action, but merely holds that the first amendment does not prevent a promissory estoppel action against the press" (p. 879).

The sixth defamation case is *Lence v. Hagadone Inv. Co.* (1993) where the Supreme Court of Montana dismissed a libel and privacy suit filed by a lawyer who was the subject of unfavorable newspaper reports. John A. Lence alleged the Inter Lake Publishing Co. reported inaccurately on a professional complaint against him. The complaint was dismissed. The lawsuit also cited articles on a subsequent, unrelated building code violation.

The Supreme Court of Montana ruled the article on the complaint was privileged because it involved a proceeding of the state Supreme Court's Commission on Practice (*Lence v. Hagadone Inv. Co.*, 1993, p. 443). The supreme court also found that all of the articles cited in the suit were substantially true.[29]

Lence argued that he should be allowed to file a negligence claim by referring to the U.S. Supreme Court's statement in *Cohen* that the First Amendment does not allow newspapers to invade the rights of others (*Lence v. Hagadone Inv. Co.*, 1993, p. 445-446). Lence contended the newspaper had a duty to determine whether the allegations in the professional complaint were true, and to keep the complaint confidential. The Supreme Court of Montana rejected the argument, saying the newspaper had no such duty. The reporter's "role was merely to let the public know that an investigation had been initiated, not to undertake an investigation herself" (p. 446).

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[28] Privilege gives statements made in the performance of an official duty an exemption from liability for defamation (Black's, 1979, p. 1077).

[29] The newspaper incorrectly reported the complaint was filed with the state's Supreme Court (*Lence v. Hagadone Inv. Co.*, 1993, p. 437). In the subsequent articles, the newspaper reported the lawyer had been charged with a building code violation, when in fact a corporation created by the lawyer to hold title to his office building was accused of the violation (p. 438-439).

Three Regulation of Speech Cases Citing Cohen

The first case is *Lind v. Grimmer* (1993) where the U.S. District Court for the District of Hawaii held unconstitutional a law prohibiting disclosure of official complaints about campaign spending. The law prohibited disclosure by participants and nonparticipants in investigations resulting from complaints filed with the Hawaii Campaign Spending Commission.[30] The complaints could only become public if the commission issued a finding of probable cause, or if the person named in the complaint disclosed its existence. The case originated when the editor of a political newsletter published information about a complaint he filed, and was charged with violating the law.

The U.S. District Court held the law was intended to restrict the content of speech. Therefore, the law was subject to strict scrutiny to determine whether it involved a compelling state interest[31] and used the least restrictive means to protect that interest (*Lind v. Grimmer*, 1993, p. 1333). The district court concluded the state's interest did not justify First Amendment restrictions (p. 1334-1336). In addition, the law was overbroad because it applied to third parties who had nothing to do with the complaint and because complaints remained confidential after the Commission made a determination there was no probable cause.

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[30] Violations could be punished by up to 30 days in jail and fines of up to $1,000 (*Lind v. Grimmer*, 1994, p. 1117).

[31] The court identified possible state interests as (a) encouraging complaints and protecting witnesses, (b) preventing disclosure of unwarranted or frivolous complaints, (c) keeping complainants from using the commission's name to enhance their credibility, (d) maintaining confidence in the state Legislature by avoiding disclosure of groundless complaints, and (e) protecting investigations (*Lind v. Grimmer*, 1993, p. 1333).

The U.S. District Court rejected the state of Hawaii's argument that the U.S. Supreme Court's *Cohen* decision should control the case because when the editor filed a complaint, he agreed to the requirement that he keep it confidential. In return, the editor was able to invoke the state's power of investigation (*Lind v. Grimmer*, 1993, p. 1329). The U.S. District Court said the case differed from *Cohen* in two respects. First, the editor did not consent to the confidentiality requirement--he had no choice but to follow the rule. Second, the test for a compelling state interest, which was applicable to Hawaii's law, was not present in the *Cohen* case.

Subsequently, the U.S. Court of Appeals for the Ninth Circuit (*Lind v. Grimmer*, 1994) upheld the finding that Hawaii's law was unconstitutional. The appeals court agreed the law was intended to restrict the content of political speech. The appeals court also rejected the argument that the U.S. Supreme Court's *Cohen* decision allowed prosecution of the editor (p. 1118-1119). The appeals court said *Cohen* only applies to content neutral restrictions of speech.

The second regulation case is *Simon & Schuster v. New York State Crime Victims Board* (1991) where the U.S. Supreme Court struck down New York state's so called "Son of Sam" (p. 476) law. The law required anyone accused or convicted of a crime to turn over earnings from any work describing the crime to the state's Crime Victims Board. The board placed the money in escrow for victims. The Supreme Court said the law used a financial burden to unconstitutionally single out specific speech.

The Crime Victim's Board had argued that the Son of Sam law imposed a "general burden on any 'entity' contracting with a convicted person to transmit that person's speech" (*Simon &*

Schuster v. New York State Crime Victims Board, 1991, p. 488). To support this argument the victim's board cited the U.S. Supreme Court's statement in *Cohen* that enforcement of generally applicable laws against the press is not subject to special scrutiny. However, The U.S. Supreme Court rejected this argument saying government power to impose burdens on speech does not vary with identity of the speaker. The Supreme Court said the argument that the law did not target members of the media was therefore "irrelevant" (p. 488).

The third regulation case is *Turner Broadcasting System, Inc. v. Federal Communications Commission*. (1994) where the U.S. Supreme Court upheld federal requirements that cable operators carry local commercial and public television stations. The Supreme Court said regulations in the Cable Television and Consumer Protection and Competition Act of 1992 were content neutral and intended to fulfill an important government purpose--preserving local television programming. However, the Supreme Court also said the government had not demonstrated that the regulations would be effective, and remanded the case to a U.S. District Court for further proceedings on that point.

The U.S. Supreme Court cited its decision in *Cohen* while discussing which standard of scrutiny should be applied to the cable regulations. The Supreme Court said the regulations should not be subject to strict scrutiny, but they also were not a generally applicable law with incidental effects on the press as was the case in *Cohen* (*Turner Broadcasting System, Inc. v. Federal Communications Commission*, 1994, p. 33-34.) The Supreme Court said an intermediate standard of scrutiny was appropriate.[32]

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[32] The standard used is defined in United States v. O'Brien (1968, 391 U.S. 367). *Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994, p. 75) describes this standard as allowing content-neutral regulations that further important government interests (a) when the interest is not related to suppression of free speech and (b) any incidental restriction on First Amendment rights is only as large as necessary to fulfill the interest.

Three Cases Involving Subpoenas that cite Cohen

The first case is *United States v. Cutler* (1993) where the U.S. Court of Appeals for the Second Circuit detailed the information an attorney could subpoena from reporters in a criminal contempt proceeding. The appeals court held that defense attorney Bruce Cutler could subpoena reporters' testimony, notes and videotape outtakes relating to published statements that Cutler made during the trial of John Gotti. The statements were the basis of accusations that Cutler committed contempt by violating a federal judge's warnings not to make public statements or release information that might prejudice the outcome of the Gotti trial.

However, the U.S. Court of Appeals rejected Cutler's arguments that the journalists should also be compelled to release information about interviews with confidential government sources. Cutler argued that the U.S. Supreme Court's *Cohen* decision was one of two cases establishing that reporters cannot withhold information about confidential sources (*United States v. Cutler*, 1993, p. 71).

The U.S. Court of Appeals said journalists can be ordered to disclose sources "only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources" (*United States v. Cutler*, 1993, p. 71). The appeals court said the identity of government sources was irrelevant to the question of whether Cutler violated the judicial order.

The second case is *State ex rel. Healy v. McMeans* (1994) where the Court of Criminal Appeals of Texas ordered a county court judge to vacate an order quashing four subpoenas of journalists. The appeals court said it would issue a writ of mandamus[33] if the judge did not comply. The subpoenas were for testimony and videotape from television journalists who had reported on accusations that a funeral home operator dumped a corpse.

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[33] A writ of mandamus can be issued to compel the performance of a ministerial duty by a lower court judge who is abusing his position (Black's, 1979, p. 866). The court defined a ministerial duty as one clearly spelled out by law so that discretion or judgment cannot be exercised (*State ex rel. Healy v. McMeans*, 1994, p. 774).

The Court of Criminal Appeals said the prosecutor had no other remedy available if the accused was acquitted without testimony from the journalists. The appeals court also stated the county judge had "a ministerial duty"[34] (*State ex rel. Healy v. McMeans,* 1994,p. 775) to vacate the order quashing the subpoenas because Texas rules of evidence do not create a privilege for journalists. The appeals court added that the U.S. Supreme Court's *Cohen* decision reaffirmed that the press does not have a constitutional privilege to withhold relevant information in a criminal investigation.[35]

The third case is *Management Information v. Alyeska Pipeline Serv. Co.* (1993) where the U.S. District Court for the District of Columbia issued an order that an investigative reporter could not be forced to give a deposition in a civil suit. The Alyeska Pipeline Service Company, which operates the Trans-Alaska Pipeline System, was being sued by an oil broker for allegedly using illegal tactics to stop complaints about Alyeska's environmental abuses. The company attempted to force the reporter's testimony as part of its defense that the broker who filed the suit had acquired company documents illegally.

The U.S. District Court said the U.S. Supreme Court's *Cohen* decision shows that First Amendment protections do not give reporters immunity to break the law (*Management*

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[34] A lengthy dissent disagreed, saying the decision overruled a matter within the discretion of the county judge and therefore represented an abuse of the appeals process. The dissent said a writ of mandamus should not be used to overrule lower court judges on matters within their discretion, or as a substitute for ordinary appeals. The dissent argued the court had abused the writ by taking upon itself the task of correcting decisions simply because it believed the decisions were mistaken (*State ex rel. Healy v. McMeans,* 1994, p. 776-780).

[35] The Court of Criminal Appeals for the State of Texas was referring to the decision in *Branzburg v. Hayes* (1972, 408 U.S. 665).

Information v. Alyeska Pipeline Serv. Co., 1993, p. 475). However, the district court said that if the reporter was given copies of allegedly stolen documents, that did not "lead inescapably to the conclusion that the journalist has committed a tort" (p. 475).[36] The district court added that the reporter had received the copies while gathering facts for a story, and newsgathering privilege applied. Alyeska, meanwhile, had access to the original documents, so its request for the reporter's testimony was irrelevant to its case.

A Case Involving Illegally Obtained Information

In *Marin Independent Journal v. Municipal Court* (1993) a California appeals court affirmed a municipal court judge's confiscation of a newspaper photographer's film. The Court of Appeal of California for the First Appellate District said the photographer violated a state rule requiring judicial permission to take photographs in court. The photographs were taken when a murder suspect was brought into a courtroom.

The Court of Appeal of California said the U.S. Supreme Court's *Cohen* decision demonstrated the limits to First Amendment rights (*Marin Independent Journal v. Municipal Court*, 1993, p. 1717). The appeals court said *Cohen's* the statement that reporters cannot publish illegally acquired information with impunity allows restraints on such information--such as the confiscation of photographs taken in violation of California rules (p. 1721-1722).

A Religious Freedom Case Citing Cohen

In *Church Of Lukumi Babalu Aye v. Hialeah* (1993) the U.S. Supreme Court held that city ordinances prohibiting animal sacrifice were an unconstitutional restriction on the religion of

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[36] The tort at issue was conversion (Management Information v. Alyeska Pipeline Serv. Co., 1993, p. 475). Black's (1979, p. 300) defines conversion as the unauthorized assumption of ownership rights over property belonging to someone else. Conversion is any such act which takes the property from its owner.

Santeria. The Supreme Court held the ordinances were too broadly targeted against religion, and too narrow to protect the public health interests that the city claimed were at stake.

The U.S. Supreme Court cited its *Cohen* decision while explaining that laws with an incidental effect upon religious practices must be generally applicable before they can withstand constitutional scrutiny (*Church Of Lukumi Babalu Aye v. Hialeah*, 1993, p. 496-497).

A Case Involving a Settlement Agreement citing Cohen

In *United Egg Producers v. Standard Brands, Inc.* (1995) the U.S. Court of Appeals for the Eleventh Circuit overruled a lower court's refusal on First Amendment grounds to enforce an agreement in an advertising dispute. In 1978 a dispute between United Egg Producers and Standard Brands arose over advertisements saying cholesterol in eggs is harmful to health. Standard Brands, which is now called Nabisco Brands, Inc., agreed to stop its ads. However, United Egg Producers subsequently won an arbitration ruling that a 1990 series of Nabisco ads violated the agreement.

A U.S. District Court said enforcement of the ruling would constitute government action in violation of the First Amendment. However, the U.S. Court of Appeals, citing the U.S. Supreme Court's *Cohen* decision, disagreed. The appeals court said *Cohen* establishes that action by the state is a necessary condition to establish a First Amendment violation (*United Egg Producers v. Standard Brands, Inc.*, 1995, p. 942-943). The appeals court said the mere enforcement of a legal agreement between two private parties does not constitute government action that violates the constitution.[37]

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[37] The U.S. Court of Appeals said there is one exception to this rule, but it did not apply (*United Egg Producers v. Standard Brands, Inc.*, 1995, p. 943). The U.S. Supreme Court in *Shelley v. Kraemer* (1948, 334 U.S. 1) held that enforcement of racially restrictive covenants between private parties does constitute state action requiring a constitutional analysis.

Discussion

This review paints a mixed picture of *Cohen's* impact. The case has, as predicted, sometimes provided a powerful weapon against the press. However, judges have also been careful to describe the limits of the ruling, frequently refusing to interpret *Cohen* as providing novel restrictions on established First Amendment freedoms.

The *Cohen* case has most frequently influenced decisions regarding journalists' promises and privacy cases. *Cohen* has been less influential in the area of defamation, although two recent decisions suggest this may change. In other areas *Cohen* has had minimal impact, appearing primarily as a reference to principles established before the case was decided. Each of these areas will be discussed in turn.

Cohen has consistently been interpreted to require reporters to keep promises to conceal the identity of sources, but there are limits to this obligation. Three cases where reporters promised to conceal a source's identity involved individuals with HIV or AIDS (*Anderson v. Strong Memorial Hospital*, 1991; *Doe v. Shady Grove Adventist Hospital*, 1991; *Multimedia WMAZ, Inc. v. Kubach*, 1993). The *Anderson* case upheld a damage award against a newspaper that was a third party to a claim against a doctor and a hospital. The *Multimedia* case upheld a much larger award against a television station that made, and quickly corrected, a mistake allowing identification of an AIDS patient. In the *Doe* case, however, a court said that a patient did not waive his right to privacy by granting interviews to journalists who promised to conceal his identity.

A fourth case involved a journalist's promise to a woman who had been sexually molested (*Ruzicka v. Conde Nast Publications, Inc.*, 1991). The *Ruzicka* case resulted in a finding that identifying a source by reporting details of her background violated a confidentiality agreement.

Three of the four cases where *Cohen* was interpreted as making promises of confidentiality enforceable seem to expand on the original decision, which involved a deliberate effort to break the promise. In each of these cases, journalists made some effort to conceal the identity of the individuals involved. However, all four cases involved people victimized by either HIV or sexual abuse--circumstances that can expose individuals to ridicule and embarrassment. The *Ruzicka* case also was tried under Minnesota law, so the application of *Cohen* was probably strengthened by this factor. Still, it appears that courts regard promises to sources with a strong interest in keeping their identity private as particularly susceptible to enforcement under *Cohen*. The fact that privacy interests are implicated in each of these cases also suggests there is merit to Harvey's (1992) suggestion that *Cohen* offers plaintiffs a way to prevail in privacy cases.

These four cases contrast with the record in three other cases (*Morgan v. Celender*, 1992; *Scheetz v. Morning Call*, 1991; *Wildmon v. Berwick Universal Pictures*, 1992). Each of these cases limits the effects of *Cohen*. In *Morgan,* a promise of confidentiality was not sufficient to bar journalists from publishing information about sexual abuse that already was public. The *Scheetz* case rejected the argument that *Cohen* might be used to expand privacy protection by only allowing publication of legally obtained information. The *Wildmon* case held that *Cohen* does not relieve a source from responsibility for clearly stating the terms of a contract.

The *Morgan* and *Scheetz* cases suggest that individuals who take action that could make private facts public cannot then require journalists to conceal those facts, regardless of how embarrassing the disclosure may be. The *Wildmon* case, meanwhile, suggests that contracts between journalists and sources are subject to some of the requirements of contract law, and *Cohen* does not offer a way to avoid those requirements.

The second area where *Cohen* has frequently surfaced is defamation suits. There have been two consistent findings in this area. First, *Cohen* bars the use of privacy claims to avoid the strict requirements for proving defamation suits (*Moldea v. New York Times Co.*, 1994a; *Washington v. Smith,* 1995). Second *Cohen* does not create new rules favoring plaintiffs in libel cases (*Geick v. Kay,* 1992; *Lence v. Hagadone Inv. Co.*, 1993; *Moldea v. New York Times Co.*, 1992).

However, two opinions suggest that *Cohen* may still have some influence on how libel cases are tried (*Desnick v. American Broadcasting Companies, Inc.*, 1995; *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 1995). *Desnick* suggested that *Cohen* could make journalists who use deceit to gain access to information liable under relevant state laws. This suggestion was applied in *Food Lion*, where ABC faces trial under North Carolina law for making false representations to gain access to Food Lion stores. If this line of reasoning is sustained by other courts, it will have serious implications for reporters using surreptitious techniques.

However, in other areas decisions have refused to expand the reach of *Cohen* (*Lind v. Grimmer,* 1993; *Simon & Schuster v. New York State Crime Victims Board,* 1991; *United States v. Cutler*, 1993). *Lind* held the state of Hawaii could not use *Cohen* to require citizens to keep complaints about politicians confidential. *Simon & Schuster* held that Cohen did not mean a law penalizing the content of speech can escape constitutional scrutiny because it did not specifically target the press. The *Cutler* case rejected the argument that *Cohen* prohibits reporters from withholding information about confidential sources.

The remaining six cases are all instances where *Cohen* was cited not because it established new rules of law, but because it reaffirmed well-established precedent (*Church Of Lukumi Babalu Aye v. Hialeah,* 1993; *Management Information v. Alyeska Pipeline Serv. Co.*, 1993; *Marin Independent Journal v. Municipal Court,* 1993; *State ex rel. Healy v. McMeans*, 1994; *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 1994; *United Egg Producers v. Standard Brands, Inc.*, 1995). For example, the *Marin*, *Healy* and *Management Information* cases all refer to Cohen as a source for the rule that reporters have no special privilege allowing them to illegally acquire information. The other cases concern application of rules governing constitutional analyses of state action.

Conclusion

At this stage, it appears that courts still are working through many of the implications of *Cohen*. However, some tendencies are beginning to emerge.

First, Cohen offers plaintiffs a strong weapon in cases where promises of confidentiality were violated, even if the violation was inadvertent. This is highlighted by the $500,0000 damage award stemming from a 7-second mistake when a television technician set the level of digitization too low *(Multimedia WMAZ, Inc., v. Kubach,* 1993). However, this weapon has limited use, and is subject to restrictions from the application of established rules for contracts and privacy law. In other words, the conduct of journalists is not the sole issue when applying the rules established by *Cohen*. The courts also will consider the conduct of those asking for confidentiality.

These developments are consistent with the analysis of the case by Alexander (1993). This trend is less supportive of one aspect of the analysis offered by Youm and Stonecipher (1992), who argued that *Cohen* might give judges a reason to ignore the complex and subtle interactions that characterize the relationship between reporters and their sources.

However, Youm and Stonecipher also warned allowing state courts to pass on the enforcement of confidentiality agreements meant *Cohen* opened the way for resolution of such issues in forums where the press may not have any presumptions in its favor. The *Multimedia* case might be considered an example of this, and a second development suggests this argument may have more general application.

The opinions in *Desnick v. American Broadcasting Companies, Inc.* (1995) and *Food Lion Inc. v. Capital Cities/ABC, Inc.*, (1995) open the way for trials where the underlying issue is defamation, but the litigation centers on state laws regarding trespass, false promises and surreptitious recording. In other words, the focus will be on reporting techniques instead of the content of the reports. This may well produce trials where the press cannot rely on constitutional protections.

Finally, the question of whether *Cohen* will offer plaintiffs a new approach to privacy cases still is open. Although some of the decisions reviewed here suggest that may be the case, others explicitly limit *Cohen's* impact on privacy law, stating that the case doesn't offer new causes of action.

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Turner Broadcasting System, Inc., Et al. v. Federal Communications Commission Et Al., 1994 U.S. LEXIS 4831, (1994).

United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, (11th Cir. 1995).

United States v. Cutler, 6 F.3d 67, (2nd Cir. 1993).

United States v. *Williams,* 118 L. Ed. 2d 352, (1992).

Virginia Bankshares, Inc. v. Sandberg, 115 L. Ed. 2d 929, (1991).

Washington v. Smith, 893 F. Supp. 60, (D.D.C. 1995).

Wildmon v. Berwick Universal Pictures, 803 F. Supp. 1167, (N.D. Miss. 1992).

Youm, K.H., & Stonecipher, H.W. (1992). The legal bounds of confidentiality promises: promissory estoppel and the First Amendment. *Federal Communications Law Journal, 45*(1), 63-88.

Appendix A: Chart of Cases Citing *Cohen v. Cowles Media Co.*

Type of Case	Related decisions in a case
First Amendment Cases	
Promise of confidentiality	
Anderson v. Strong Memorial Hospital (1991)	
Ruzicka v. Conde Nast Publications, Inc. (1991)	
	Ruzicka v. Conde Nast Publications, Inc. (1992)
	Ruzicka v. Conde Nast Publications, Inc. (1993)
Morgan v. Celender (1992)	
Wildmon v. Berwick Universal Pictures (1992)	
Multimedia WMAZ, Inc. v. Kubach (1993)	
Doe v. Shady Grove Adventist Hospital (1991)	
Privacy	
Scheetz v. Morning Call (1991)	
Defamation	
Food Lion Inc. v. Capital Cities/ABC, Inc., (1995)	
Desnick v. American Broadcasting Companies, Inc. (1995)	
Moldea v. New York Times Co. (1992)	
	Moldea v. New York Times Co. (1994a)
	Moldea v. New York Times Co. (1994b)
Washington v. Smith (1995)	
Geick v. Kay (1992)	
Lence v. Hagadone Inv. Co. (1993)	
Regulation of speech	
Lind v. Grimmer (1993)	
	Lind v. Grimmer (1994)
Simon & Schuster v. New York State Crime Victims Board (1991)	
Turner Broadcasting System, Inc. v. Federal Communications Commission (1994)	
Subpoena	
United States v. Cutler, 1993	
State ex rel. Healy v. McMeans (1994)	
Management Information v. Alyeska Pipeline Serv. Co. (1993)	
Illegally obtained information	
Marin Independent Journal v. Municipal Court (1993)	
Religious Freedom	
Church Of Lukumi Babalu Aye v. Hialeah (1993)	
Settlement agreement	
United Egg Producers v. Standard Brands, Inc. (1995)	
Contract Cases*	
Virginia Bankshares, Inc. v. Sandberg (1991)	
Starry Construction Co. v. Murphy Oil USA, Inc. (1992)	
Texaco Refining and Marketing v. Davis (1993)	
American Computer v. Boerboom Intern. (1992)	
Criminal Case*	
United States v. Williams (1992)	

*These cases are described in Appendix B.

Appendix B: Cases Unrelated to the First Amendment Citing *Cohen v. Cowles Media Co.*

Four Contract Cases citing Cohen

In *Virginia Bankshares, Inc. v. Sandberg* (1991) the U.S. Supreme Court ruled that minority shareholders in a bank could not recover damages when their stock was purchased in a merger for what they believed was less than a fair price. The Supreme Court cited its *Cohen* decision in a footnote (p. 949) to support its rejection of an argument that it should not consider one issue in the case that was not raised at a lower level.

In *Starry Construction Co. v. Murphy Oil USA, Inc.* (1992) the U.S. District Court for the District of Minnesota dismissed a suit alleging a breach of a contract for failing to supply asphalt cement oil used to pave roads. Starry Construction Co. filed the suit after its supplier ran short of asphalt during the Persian Gulf War. The district court cited the Minnesota Supreme Court's first *Cohen* decision in dismissing an allegation of negligent misrepresentation--supplying false information to a business that suffers a loss from relying on the information. The district court said *Cohen* had established that failure to perform a promise is not fraud unless the promisor did not plan to keep the bargain when it was made (p. 1368).

In *Texaco Refining and Marketing v. Davis* (1993) the U.S. District Court for the District of Oregon upheld Texaco's termination of a franchise agreement. Barry P. Davis leased three stations under an agreement requiring their continuous operation, but he closed the stations from sundown Friday to sundown Saturday, citing religious reasons. Davis defied both a temporary restraining order and a preliminary injunction ordering him to keep the stations open. Texaco then terminated the lease because failing to comply with the court orders violated the franchise agreement.

Davis cited the U.S. Supreme Court's *Cohen* decision in a counterclaim arguing that Texaco had used a federal court to enforce requirements of a state law that infringed his First Amendment right to practice religion. However, the U.S. District Court said Davis incorrectly relied on *Cohen's* finding that the application of state law by a state court constitutes government action within the purview of the Fourteenth Amendment. Texaco never took action in any state court in the case (*Texaco Refining and Marketing v. Davis,* 1993, p. 1233).

In *American Computer v. Boerboom Intern.* (1992) the U.S. Court of Appeals for the Eighth Circuit upheld dismissal of a counterclaim in a lawsuit involving leased computer equipment. The counterclaim was filed by two farm equipment dealers who stopped making lease payments because of problems with the equipment. The appeals court held the dealers failed to establish that they were mislead into leasing the equipment used to communicate with the J.I. Case Co. The opinion cited the Minnesota Supreme Court's first decision in *Cohen* as supporting a finding that some statements the dealers complained about concerned future acts and therefore, could not be considered fraudulent (p. 1214).

A criminal case citing Cohen

In *United States v. Williams* (1992) the U.S. Supreme Court reversed the dismissal of a grand jury indictment for making false statements on loan applications. The Supreme Court said the indictment should not have been dismissed on the grounds that prosecutors failed to present exculpatory evidence to the grand jury. The Supreme Court cited its *Cohen* decision in a footnote (p. 364) to support a finding that once a lower court ruled on the question involving exculpatory evidence, the Supreme Court could consider the matter regardless of when the matter was raised.

The Third-Person Effect and Attitudes Toward Expression

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The Third-Person Effect and Attitudes Toward Expression

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Abstract

This paper examines the third-person effect in relation to support for censorship. Based on a random-sample mail survey of 275 people, it finds that most of those sampled believed that media messages affected others more than themselves. In addition, the study finds that the larger they estimated that discrepancy between media effects on themselves and on others, the more likely they were to support restrictions on expression.

The Third-Person Effect and Attitudes Toward Expression

Introduction

The First Amendment to the U.S. Constitution guarantees freedom of speech and of the press, but as anyone with even passing knowledge of the law recognizes, those guarantees are far from absolute. The U.S. Supreme Court, for instance, has ruled that entire categories of expression -- obscenity, libel, "fighting words" -- are subject to less protection than other types of expression.[1] The broadcast media are regulated by the Federal Communications Commission, which imposes its own rules on political speech, children's programming, and indecency.

In many instances, the Supreme Court has approved limits on expression, often with the expressed intent to protect others from presumed harmful effects. In *Paris Adult Theatre I v. Slaton,* for instance, the Court decided that a state legislature could legally limit distribution of obscene material in an effort to protect members of society: "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist."[2] "Indecent" but not "obscene" broadcasting content can be regulated because of the presumed effect it might have on children who might come in contact with it, the Court ruled in *FCC v. Pacifica Foundation.*[3] In *Hazelwood School District v. Kuhlmeier,* a high school principal's censorship of a student newspaper was ruled to be justified, in part, to ensure that immature students who might read the publication would not be harmed.[4]

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[1] For example, see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Roth v. United States, 354 U.S. 476 (1957).

[2] 413 U.S. 49 (1973).

[3] 438 U.S. 726 (1978).

It can be argued that the judicial system in these cases was merely reflecting the views of the public. Academic researchers and professional pollsters have examined public support for freedom of expression for half a century, finding that Americans cherish the First Amendment far more in the abstract that in the specific. When asked in general to judge the importance to society of freedom of speech and of the press, they respond overwhelmingly that freedom of expression is an essential part of this country's heritage. But when asked whether specific forms of expression should be protected, they are much more likely to respond negatively. [5] The Thomas Jefferson Center for the Protection of Free Expression, in a 1990 survey, found that 87.3 percent of the public ranked as "very important" the right to speak their minds and express opinions without fear of arrest or interference, but just 58.6 percent rated as "very important" the press's ability to publish whatever information it uncovered; more than half favored government regulation of media content involving sex or violence.[6]

Sociologist W. Phillips Davison, in a 1983 journal article, postulated a fascinating hypothesis called the third-person effect that could help to explain why some people seek to limit or censor the information made available to others.[7] It could explain why some people want to censor pornography, hate speech, television programming, movies or politically sensitive media messages. But in the dozen years since Davison's seminal Public Opinion Quarterly article, few researchers have attempted to test Davison's link between the third-person effect and censorship. This study presents an attempt to determine whether the third-person effect is correlated with support for restrictions on expression. Such a link would have important ramifications in the area of media content regulation; if restrictions on media content are a result of the third-person effect, then policies aimed at protecting the public from harmful messages may be based on an erroneous assumption of media effects.

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[4] 484 U.S. 260 (1988).

[5] Robert O. Wyatt, Free Expression and the American Public: A Survey Commemorating the 200th Anniversary of the First Amendment (Murfreesboro, TN: American Society of Newspaper Editors, 1991), 36.

[6] Thomas Jefferson Center for the Protection of Free Expression, Public Attitudes Toward Censorship and Free Expression, unpublished paper, Charlottesville, Va., 1990.

[7] W. Phillips Davison, "The Third-Person Effect in Communication," Public Opinion Quarterly 47 (1983): 1-15.

Literature Review

Davison's third-person effect hypothesis consists of two main concepts. First, people tend to overestimate the effect that persuasive communication has on others. Second, any effect that the communication achieves may be attributable not to the individual, but to the belief by that individual that the communication is having an effect on others.

Davison summarized his hypothesis this way:

> In its broadest formulation, this hypothesis predicts that people will tend to overestimate the influence that mass communications have on the attitudes and behaviors of others. More specifically, individuals who are members of an audience that is exposed to persuasive communication (whether or not this communication is intended to be persuasive) will expect the communication to have a greater impact on others than on themselves. And whether or not these individuals are among the *ostensible* audience for the message, the impact that they expect this communication to have on others may lead them to take some action. Any effect that the communication achieves may thus be due not

to the reaction of the ostensible audience but rather to the behavior of those who anticipate, or think they perceive, some reaction on the part of others.[8]

In an oft-quoted line from his study, Davison summarized the first part of his hypothesis by stating, "In the view of those trying to evaluate the effects of communication, its greatest impact will be not on 'me' or 'you,' but on 'them' -- the third persons."[9] The second half of his hypothesis -- that the belief in communication's effect on others will lead to behavioral changes -- has not been as widely cited or studied.

The third-person effect has provided a robust arena for research since Davison's initial article. Most of the published or presented work stemming from that research can be separated into two distinct approaches. Some researchers have examined the third-person effect through survey research, attempting to study attitudes and perceptions on existing issues; others have used an experimental approach to determine how people will respond to hypothetical communication.[10] Whatever the approach, though, virtually all researchers have found at least some evidence for the existence of a third-person effect.[11]

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[8] Ibid., 3.

[9] Ibid.

[10] The only published exception has been an attempt to link the third-person effect to events in American journalism history such as the Sedition Act of 1798 and the Yellow Press role in causing the Spanish-American War. James L. Baughman, "The World is Ruled by Those Who Holler the Loudest: The Third-Person Effect in American Journalism History," Journalism History 16 (1989): 12-19.

[11] For example, L. Erwin Atwood, "Illusions of Media Power: The Third-Person Effect," Journalism Quarterly 71 (1994): 269-281; Jeremy Cohen and Robert G. Davis, "The Third-Person Effect and the Differential Impact in Negative Political Advertising," Journalism Quarterly 68 (1991): 680-688; Albert C. Gunther, "What We Think Others Think," Communications Research 19 (1991): 355-372; Dominic Lasorsa, "Real and Perceived Effetcs of 'Amerika,'" Journalism Quarterly 66 (1989): 373-378; Dominic Lasorsa, "Policymakers and the Third-Person Effect," in J. David Kennamer, ed., Public Opinion, the Press and Public Policy, (Westport, CT: Praeger Publishers, 1992);

The empirical research into the third-person effect has established important limits on the effect.

--The third-person effect is not universal among all people. Researchers who found evidence of the phenomenon reported that anywhere from 31 percent to 88 percent of the people studied reported a greater media effect on others than on themselves. In a review of third-person effect research, Lasorsa wrote that the general implication is that about half of the population typically exhibits a third-person effect by perceiving greater media effects on others than on themselves.[12]

--The amount of misperception of media effects on others is in part a function of social distance. In short, the more unlike me the others are, the more I believe they are pliable in the face of persuasive communication.

--If the source is perceived to be negative, individuals are more likely to perceive a greater effect on others. As Cohen *et al.* stated their findings involving defamatory communication, "The more the source ... is perceived as negatively biased, the greater the discrepancy between perceived media influence on self and on others."[13]

--If the message is perceived to be negative, then the individual is more likely to perceive influence on others. If it is perceived that the message is neutral or positive, then a "reverse" third-person effect is more likely -- the individual is apt to perceive greater influence on self than on others.

Richard M. Perloff, "Ego-Involvement and the Third Person Effect of Televised Network Coverage," Communications Research 16 (1989): 236-262; Albert C. Gunther and Paul Mundy, "Biased Optimism and the Third-Person Effect," Journalism Quarterly 70 (1993): 58-67.

[12] Dominic L. Lasorsa, "Policymakers and the Third-Person Effect," in J. David Kennamer, ed., Public Opinion, the Press and Public Policy (Westport, CT: Praeger Publishers, 1992) 169.

[13] Jeremy Cohen, Diana Mutz, Vincent Price and Albert Gunther, "Perceived Impact of Defamation," Public Opinion Quarterly 47 (1983): 172.

--The better educated are more likely to perceive that others are affected more by persuasive communication, although this finding is somewhat tentative.[14] There also is some evidence that age is positively correlated to a perception that others are affected more than self.[15]

--If the issue being communicated is of great importance to the individual, then the individual will expect others to be affected more. Several researchers have speculated that if the individual is highly involved in the issue, then the individual will perceive himself or herself to be an "expert" on that issue and immune to communication that can sway others.

In sum, then, it appears that empirical evidence compiled during the past twelve years supports the existence of a third-person effect under certain conditions. Rather than Davison's broad, almost universally applicable statement, then, it might be more accurate to restate the third-person effect this way: Some individuals, under some conditions, will perceive that mass communication, whether intended to be persuasive or not, will influence others more than themselves; in fact, they will tend to underestimate the amount it influences themselves and overestimate the amount it influences others, with the magnitude of that misperception dependent on variables such as the source of the message, the nature of the issue being communicated, and the social distance between individuals and the "others" who are being affected. The more unlike "me" the "others" are, the more "I" will expect them to be negatively influenced. Because of these misperceptions, these individuals may tend to change their behavior because they believe the communication has influenced or will influence other people.

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[14] James T. Tiedge, Arthur Silverblatt, Michael J. Havice and Richard Rosenfeld, "Discepancy Between Perceived First-Person and Third-Person Mass Media Effects," Journalism Quarterly 68 (1991): 150.

[15] Ibid.

Meanwhile, social science research into expressive rights over the past 50 years has created a rich environment for studying attitudes toward free speech and freedom of the press. Wyatt cited an American Institute of Public Opinion survey in 1936 as one of the first such studies, while other surveys were conducted by organizations such as Fortune magazine and Gallup.[16] Generally, these surveys found a dichotomy -- respondents reported overwhelmingly that they believed in the principles of free speech and freedom of the press, but they were much less likely to support specific expressive acts such as allowing "radicals" to hold meetings, permitting the press to criticize the president, or sanctioning the printing of a nude painting.[17]

Modern social science research into freedom of expression is generally dated from Stouffer's survey on attitudes toward communists' civil liberties.[18] Page and Shapiro reported that a compilation of General Social Survey questions about civil liberties from 1972 to 1990 suggested that support for expressive rights increased steadily during the period,[19] although Andsager suggested that trends in survey research about free expression are difficult to measure because many studies used questions based on salient issues of the time, such as communism in the 1950s.[20] Another confounding factor is the vast variation in questionnaire format; some studies were based on as few as three questions designed to measure support for expressive rights, while others have been based on scales constructed from a battery of as many as 58 questions.[21]

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[16] Wyatt.

[17] Ibid.

[18] Samuel A. Stouffer, Communism, Conformity and Civil Liberties (Garden City, N.J.: Doubleday, 1955).

[19] Benjamin I. Page and Robert Y. Shapiro, The Rational Public: Fifty Years of Trends in Americans' Policy Preferences (Chicago: The University of Chicago Press, 1992) 85-90.

An example of the latter is Wyatt's study of personal and media rights.[22] Based on comprehensive national surveys covering two years, Wyatt's study found people expressing greater support for personal rights than for media rights, with as many as 55 percent saying broadcasters should not be allowed to disclose the projected winners of elections while voting is still occurring.[23] Respondents were asked to answer 24 questions ranking support for free speech rights and 34 questions gauging support for media rights.

Despite differences in research design, questionnaire construction and reported results, several demographic variables have been highly correlated with tolerant attitudes toward civil liberties, including education, age and religion.[24] Support for expressive rights is higher among the better educated, the younger and less religious.[25]

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[20] Julie Andsager, Examining The Relationship Between Media and Personal Expressive Rights: The Effect of Need for Cognition, unpublished Ph.D. dissertation, The University of Tennessee-Knoxville, 1993, 8.

[21] Andsager, 10.

[22] Wyatt.

[23] Ibid., 13.

[24] Karen von Elten and Tony Rimmer, "Television and Newspaper Reliance and Tolerance for Civil Liberties," Mass Comm Review 19 (1992): 27-35.

[25] Ibid., 29.

In general, Americans support freedom of speech and freedom of the press as abstract principles. But when it comes to specific instances, they become more likely to endorse censorship if the communication runs counter to their personal beliefs.[26]

Davison speculated that censorship might provide the most interesting area for research into the third-person effect, hypothesizing that the phenomenon might explain why some people want to prevent others from seeing or reading certain material. To illustrate his point, he wrote of members of the former Maryland State Board of Censors (which existed from 1916 to 1981) who spent years watching movies they deemed unfit for others to see, but which apparently did not affect the morals of board members themselves. Apprehension and fear over the effect of "heretical" or dissident communication on others "probably has accounted for a grisly percentage of the world's suffering and horror," Davison wrote. Yet, he added, "Insofar as faith and morals are concerned, at least, it is difficult to find a censor who will admit to having been adversely affected by the information whose dissemination is to be prohibited."[27]

Rucinski and Salmon wrote that the third-person effect's link to censorship might be the most important aspect of Davison's model because of its societal implications.[28] Gunther wrote that a third-person effect link to support for restrictions on pornography has "interesting implications for public policy."[29]

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[26] Wyatt, 35.

[27] Davison, 14.

[28] Dianne Rucinski and Charles T. Salmon, "The 'Other' as the Vulnerable Voter: A Study of the Third-Person Effect in the 1988 U.S. Presidential Campaign," International Journal of Public Opinion Research 2 (1990): 346.

[29] Albert C. Gunther, "Overrating the X-Rating: The Third-Person Perception and Support for Censorship of Pornography," Journal of Communication 45 (1995): 37.

Despite the case Davison and others have made for using the third-person effect to explain censorship, though, few researchers have looked in to the connection between freedom of expression and the third-person effect.

Gunther, in his survey on attitudes toward pornography, attempted to ascertain whether the perception that others were more affected by exposure to sexually explicit material could be linked to support for pornography restrictions. Gunther reported that the degree of perception of affect on others more than self was the single greatest predictor of whether the respondents would favor restrictions on pornography.[30]

A study by Lometti *et al.* was an attempt to link the third-person effect to support for restrictions on violent, sexually explicit or otherwise socially unacceptable television content.[31] Rather than use aggregate opinions about the effect of television programming on the respondents themselves and the perceived effect on others, Lometti *et al.* asked respondents in their national telephone interview whether they had watched, discussed or read about any of 48 specific programs. Those who had were asked if anything they saw or heard was personally unacceptable; those who answered affirmatively were then asked to name specific things they objected to. The objections were then coded. Responses were marked as examples of the third-person effect if respondents cited one of several reasons involving media effects on others, such as "the program makes other people think inappropriate behavior is acceptable" or "people will imitate unacceptable behavior." Methodologically, the Lometti *et al.* study measures, then, not whether people exhibit a third-person effect, but the number of times some people cite third-person effects. For instance, one person who objected to ten programs was given the same weight in the study as were ten people objecting to one program each.

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[30] Ibid.

[31] Guy Lometti, Linda L. Ashby and Wendy Welch, "The Nature of the Public's Objections to Television Programs: An Examination of Third-Person Effects," Paper presented to Communication Theory and Methodology Division at Association for Education in Journalism and Mass Communication annual meeting in Atlanta, August 1994.

Rucinski and Salmon, meanwhile, found only partial support for their hypothesis that the greater the third-person effect, the greater the desire for an independent monitoring commission to oversee campaign-related media content.[32]

Research Hypotheses

This study was designed to measure whether there is, as Davison and others have speculated, a link between the third-person effect and support for censorship, particularly in the areas of television and movie sex and violence.

The third-person effect can be articulated as the difference between the degree to which an individual perceives he or she is affected by a media message and the degree to which that individual perceives that others are affected by the same message. If the individual believes that others are affected more, the amount of that difference between perceived first-person effect and perceived third-person effect can be categorized as the degree to which the individual exhibits the third-person effect.[33]

The first research hypothesss is that a majority of individuals will exhibit a third-person effect, believing that media content will affect others more than themselves. The second is that individuals who exhibit the third-person effect will be more likely to support restrictions on media expression, while individuals who do not exhibit the third-person effect -- whose perceived first-person effect is equal to or more than their perceived effect on others -- will either be positively correlated with support for freedom of expression, or will have no significant correlation. Specifically, the two research hypotheses are:

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[32] Rucinski and Salmon, 360.

[33] Tiedge, Silverblatt, Havice and Rosenfeld, 143.

> H1: Most individuals will exhibit a third-person effect.
>
> H2: The degree to which individuals exhibit the third-person effect will correlate with support for restrictions on expression.

Design and Method

This research consisted of a mail survey of randomly selected residents of a Southeastern U.S. county measuring their attitudes toward media effects and freedom of expression issues.

The survey instrument construction and distribution plan were guided by Dillman's Total Design Method (TDM).[34] This study consisted of surveys mailed to households selected at random. To ensure adequate participation by both sexes, households receiving the mailing were asked that questionnaire be completed by the adult in the household who had the most recent birthday.

Respondents were asked to complete an eight-page questionnaire. Each questionnaire asked respondents to gauge their support for a number of freedom of speech and press issues as a way to determine their overall support for freedom of expression. They also were asked estimate the effect of several media messages each on themselves and on other people in general.

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[34] Don A. Dillman, Mail and Telephone Surveys: The Total Design Method (New York: John Wiley & Sons, 1978).

Each questionnaire was accompanied by a cover letter on university letterhead written using the TDM method, plus a postage-paid return envelope. One week after the initial mailing, each respondent was mailed a postcard reminder of the importance of completing and returning the questionnaire. Approximately one month after the initial mailing, respondents who had not yet returned their completed questionnaires were sent a third mailing containing a new cover letter, another copy of the questionnaire, and another postage-paid return envelope. Because some of the 800 respondents selected from the Cross Directory had moved and either left no forwarding address or their forwarding order had expired, and because a few of those selected died after the directory was published, the U.S. Postal Service was unable to deliver 113 of the questionnaires. By the end of the third mailing wave, 275 completed, usable surveys were returned, for a 40 percent response rate.[35]

A 40 percent response rate for a mail survey is not ideal, but it also is not unheard of. Dillman noted that mail surveys of the general population generally have lower response rates than do surveys of homogenous groups, such as members of a religious affiliation or of an academic specialty.[36] Several published studies with response rates lower than or similar to the rate in this study have been reported.[37]

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[35] Dillman, 50; Earl Babbie, Survey Research Methods (Second ed.) (Belmont, Calif.: Wadsworth Publishing Co., 1990): 182-183.

[36] Dillman, 51.

[37] Fiona Chew, "The Relationship of Information Needs to Issue Relevance and Media Use," Journalism Quarterly 71 (1994): 679 (25.8 percent); Ann Auman, "Design Desks: Why Are More and More Newspapers Adopting Them," Newspaper Research Journal 15 (1994): 129-130 (31.4 percent); Thomas V. Dickson, "Self-Censorship and Freedom of the Public High School Press," Journalism Educator 49 (1994): 58 (41 percent).

Respondents were asked a battery of 12 questions measuring their support for freedom of expression under a variety of circumstances, with responses ranging from 1 (absolute protection) to 5 (no protection at all. (Figure 1). Respondents also were asked to gauge the effect of a variety of media messages on themselves and on others. The question order was altered on the second set of questions, concerning media effects on others, to reduce question-order bias (Figures 2 and 3). The media effect questions had a five-point Likert-type response option, ranging from 1 to 5, with 1 signifying "strongly agree" and 5 signifying "strongly disagree." Respondents whose "effect on self" scale results were higher than their "effect on others" scale were found to exhibit a third-person effect. If the results of the two scales were equal, or if the "effect on others" scale was higher than the "effect on self" scale, the respondents was not found to exhibit a third-person effect.

The freedom of expression questions also employed a five-point answer system. These questions were adapted from Wyatt's survey work on freedom of expression.[38] Results from the freedom of expression questions were used to create a freedom of expression scale. Scales also were developed using the questions on media effect on self and media effect on others. The media effects on self scale and media effects on others scale were used to create a fourth scale, a third-person effect measurement based on the difference between the media effect on self scale and the media effect on others scale. For example, a respondent whose combined score on the media effects on self battery of questions was 20 and whose combined score on the media effects on others battery of questions was 13 would have a score on the new third-person scale of +7. Respondents who perceived media effects on others to be greater than media effects on themselves were determined to exhibit the third-person effect.

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[38] Wyatt, 91-97.

The validity of the scales was measured using Chronbach's alpha.[39] The minimum acceptable alpha level for social science scales is subject to debate; some statistics scholars argue that .50 or .60 will suffice for early stages of research, while others suggest a standard of .70.[40] Further, some statisticians have contended that lower minimum alpha levels will suffice for the early stages of research and in determining differences between groups, while higher minimums are required when scores are used for making important decisions about individuals (such as their selection for or placement in social programs).[41] The freedom of expression questions were combined, with a Chronbach's alpha of .76 The scale on media effect on self had an alpha of .88 and effect on others in general had an alpha of .85.

Analysis and Results

On the freedom of expression scale, questions concerning the rights of media to criticize government leaders got the most widespread support. Nearly half of the survey participants (47.6 percent) supported absolute protection when the media criticize government leaders. Conversely, almost as many (43.6 percent) said the media should have little or no protection when disseminating material of a sexual mature. (Table 1)

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[39] Marija J. Norusis, SPSS/PC+ Statistics 4.0 (Chicago: SPSS Inc, 1990) B-190.

[40] Elazar J. Pedhazur and Llora Pedhazur Schmeklin, Measurement, Design and Analysis: An Integrated Approach, (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1991): 109.

[41] Ibid.

When asked to assess how they would be affected by a variety of media messages, participants in this study clearly thought they would be more affected by news of a political nature and by product advertising. At the same time, they perceived they would not be affected by violence depicted on television on in the movies or by material of a sexual nature. For instance, more than two-thirds of those surveyed (69.1 percent) agreed somewhat or agreed strongly with the comment, "My opinion of a political leader (such as the President or the Governor) would be lowered if I read a newspaper article or heard a broadcast report alleging criminal activity by the official." Meanwhile, a nearly equal number of survey respondents (67.6 percent) strongly disagreed that "Watching a television program that depicts physical violence tends to make me more violent in my personal life." In many ways, these results confirm findings by other researchers that the third-person effect is more pronounced when the media message is perceived to be negative.[42] If it is perceived to be good to be influenced by a message (such as a public service annnouncement about the importance of wearing seat belts), people report they are influened by the message more than others. If it is bad to be influenced by the message, then people tend to say the are less affected by the message than are others. (Table 2)

The results of this study show that when the media message involves depictions of violence or sex, individuals perceive they are not affected by the media message; on the other hand, when the message involves political matter, these same individuals perceive they are more strongly affected.

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[42] Gunther and Thorson, 592. Also Esther Thorson and James Coyle, "The Third-Person Effect in Three Genres of Commercials: Product and Greening Ads, And Public Service Annoucements," The Proceedings of the 1994 Conference of The American Academy of Advertising (Atlanta: American Academy of Advertising, 1994) 103-112.

When the question turned to effects of these same media messages on others, the strongest effects were seen on the issues involving politics, while there was less effect seen concerning violent or sexual TV or movies. Two-thirds of the survey participants (67.6 percent) somewhat or strongly agreed that others would have their opinions of public officials lowered if they heard or read media messages. At the same time, about half (48.7 percent) strongly or somewhat agreed that violent television program makes other people more violent (Table 3).

When compared with the results from the media effects on self questions, it is apparent that for many media messages such as violent TV programming or television or movie depictions of sexual material, people tend to think they are significantly immune to those messages, while they perceive that others are much more susceptible.

The first hypothesis was that a majority of respondents would exhibit a third-person effect. Each question concerning perceived media effects had a possible score ranging from 1 (strongly agree) to 5 (strongly disagree). Each respondent's score on the media effects on self scale and on the media effects on others scale could range from 9 to 45. Therefore, if a respondent's score on the media effects on self scale was higher than that respondent's score on the media effects on others scale, that individual was determined to exhibit a third-person effect; that is, those individuals perceived that they were less effected by media messages than were other people.

An overwhelming majority of respondents -- 93.1 percent -- had media effects on self scores higher than their media effects on others scores and therefore exhibited a third-person effect. The remaining 6.9 percent of respondents had equal scores on the two scales or had lower media effects on self scores than media effects on other scores, indicating they believed they themselves to be either as affected or more affected by the media messages than others in general. These results are in line with Lasorsa's report that research has found the third-person effect in a portion of the population ranging from 31 percent to 90 percent.[43]

Further analysis revealed that respondents who exhibited a third-person effect reported higher media effects on self scores than their scores for media effects on others for each of the series of questions, while respondents who did not exhibit a third-person effect did not have significantly higher scores on the battery of questions with one exception. For those exhibiting a third-person effect, paired t-tests comparing each respondent's score on each question about media effects on self and on others resulted in t-values of at least 3.88. (Table 4) Respondents who did not exhibit a third-person effect did not have significantly different scores on a paired t-test. (Table 5)

More respondents reported they would be less affected by media messages than would other people faced with the same messages. Hypothesis 1, that a majority of respondents would exhibit a third-person effect, was supported.

To examine the second hypothesis, that the third-person effect is related to attitudes about expressive rights, each respondent's third-person score was correlated with that respondent's score on the freedom of expression scale, resulting in a correlation of .12 ($p < .05$). In addition, the more each respondent believed others would be strongly affected by the media messages in the media effects scale, the more likely that respondent was to support restrictions on expression (correlation -.36, $p < .001$). In addition, the less respondents believed they themselves would be affected by the media messages, the more likely they were to support freedom of expression (-.22, $p < .001$) (Table 6).

These results support the second hypothesis, that people want to restrict certain forms of expression, ostensibly because they believe others will be affected by that expression. At the same time, people tend to believe they are somewhat immune to those same messages. The more someone believes that others will be affected by media messages, the more willing that person will be to support restrictions on expression.

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[43] Lasorsa, "Policymakers and the Third-Person Effect," 168-169.

In summary, the data provide support the two hypotheses. First, there is ample evidence that a majority of the population exhibits a third-person effect; they believe that media messages affect other people to a greater extent that those same media messages affect themselves. Second, there is substantial evidence that the extent to which people exhibit a third-person effect correlates with a lack of support for expressive rights. In addition, the more people think others are susceptible to media messages, the more likely those people are to support restrictions on expression.

Conclusions

The completed questionnaires offer support for the hypotheses in this study. To begin, roughly nine out of ten people who returned completed questionnaires perceived that they would be less affected by a variety of nine media messages that would be other people in general. To paraphrase Davison, the greatest effect of media messages wasn't on "me" but on "them," the unnamed third-persons.[44] These individuals exhibited a third-person effect. For individuals who exhibited a third-person effect, there was a statistically significant difference in the degree to which that person thought he or she would be affected by the media messages and the degree to which others would be affected by the same messages. For individuals who did not exhibit a third-person effect, there was no significant difference in perceived effect on self and on others for any of the media messages except one, and in that case the individuals believed others would be affected less. These results represent clear support for the proposition that the third-person effect exists.

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[44] Davison, 3.

Further, the more an individual exhibited a third-person effect, the more likely that person was to support restrictions on expression. That relationship was even stronger when support for expressive rights was compared with perceived media effect on self and perceived media effect on others. In particular, there was a strong correlation between the degree to which media messages were perceived to affect others and support for restrictions on expression; the more others are swayed by the media messages, the more support there was for restrictions on expression.

Many researchers studying the third-person effect have speculated about the phenomenon's link with support for freedom of expression, but few have attempted to find empirical evidence of that link. This study was designed to determine whether there is, in fact, a third-person effect, as has been found by previous research, and whether individuals who exhibit a third-person effect are more likely to support restrictions on expression.

This study was not designed to measure the underlying sociopsychological mechanism that could explain this link between the third-person effect and support for restrictions on expression. One possible explanation, however, is that people consider themselves to be largely immune to media messages, while others are not. To protect those other people from the harmful effects of the media messages, people will want to restrict messages that they perceive to be harmful to the others. Gunther, in his study of attitudes about pornography, speculated that "optimistic bias" could explain this situation.[45] According to Gunther, people who consider themselves to be immune from harmful messages might want to protect others either out of concerns for those other people, or because failure to limit the harmful effects could harm society itself.[46]

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[45] Gunther, "Overrating the X-Rating," 29.

Whatever the underlying behavioral mechanism, this study supports the notion that people who perceive others are more affected by media messages want to restrict those messages, and the bigger that discrepancy is between media effects on self and on others, the stronger the desire to restrict expression.

The results of this study, supporting the existence of the third-person effect and linking that effect to support for restrictions on expression, have important ramifications for mass communication research and for public policy.

In regard to the former, this study adds to the considerable body of knowledge lending support to Davison's 1983 hypothesis that many people believe mass media content affects others more than themselves.[47] As recounted previously, more than a decade of published research, based both on experiments and surveys, has established that many, if not most, people exhibit a third-person effect. If people believe that the media messages affect others more than themselves, then they may feel justified in restricting certain forms of expression to "protect" those other people from harm.

If the underlying reason explaining the third-person effect is that people who feel they are "experts" on a subject will see themselves as immune to media messages, while others who not "experts" will be strongly affected by those messages, then individuals who exhibit a third-person effect may consider themselves more capable of judging which media messages should be restricted.[48]

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[46] Ibid.

[47] Davison.

The data in this study should not be overinterpreted; as even beginning researchers know, correlation is not causation. Just because the third-person effect and perceived media effects on others correlate to a statistically significant extent, one cannot say that the third-person effect causes support for restrictions on expression.

However, people do support restrictions on expression in line with their perceptions about media effects on themselves and on others. The more people think others are affected by media messages, and the greater the discrepancy between the perceived effect of those messages on the individual and on others, the more likely those people are to support restricting expression. This phenomenon is strongest when the media content depicts violence, sexual activity, or some other message with strong implications on societal mores.

This study does not measure behavior. It does, however, link perceptions to attitudes which could explain behavior. An individual who perceives others are affected more by media messages and favors restricting certain forms of expression could reasonably be expected to behave in a consistent manner. For instance, an individual who exhibits a third-person effect and supports absolute restriction on flag burning could be expected to vote for a proposed constitutional amendment banning flag burning. For mass communication researchers, this confirmation of support for the link between the third-person effect and attitudes about freedom of expression presents a broad arena for further research.

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[48] Diana C. Mutz, "The Influence of Perceptions of Media Influence: Third-Person Effects and the Public Expression of Opinion," International Journal of Public Opinion Research 1 (1989): 12.

From a societal viewpoint, the results of this study pose fascinating questions about public policy and media regulation. If restrictions on media content are based on a perception that others are affected by media messages, and if that belief is an artifact of the third-person effect, then policies aimed at protecting the public from harmful messages such as violent television programming may be based on an erroneous assumption of media effects.

No survey is conducted in a vacuum. This study was no exception. A number of events playing themselves out in the public arena may have had an impact both on perceptions of media effects and on attitudes about expression.

This study was conducted shortly after the 1995 Oklahoma City federal building bombing, which elicited comments from many in the public eye, including President Clinton, that conservative talk radio commentators had helped to foster an atmosphere of paranoia and rage against the government.[49] In addition, the well-publicized O.J. Simpson double-murder trial was under way in Los Angeles, with its attendant publicity about the extent of media coverage and the televising of the trial.[50] Finally, Republican presidential candidate Bob Dole brought additional attention to the issues of media effects and restrictions on expression with a campaign speech in which he assailed some Hollywood filmmakers, rap musicians and business interests that promote them, for the content of their films and music. His comments touched off a wide-ranging debate about the role of media in American society.[51] Separately or combined, these three events may have colored people's attitudes about media messages and expression.

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[49] Donna Petrozzello, "Oklahoma City Backlash Hits Airwaves: Talk Show Hosts Dispute Clinton's Criticism," Broadcasting & Cable 125 (May 1, 1995): 6.

[50] Debra Gersh Hernandez, "O.J. Trial Coverage Hard to Avoid," Editor & Publisher 128 (April 22, 1995): 42.

In addition, the results of this study must be viewed in context of the response rate. Any survey runs the risk of missing a portion of the public; a telephone survey will miss those without telephones, an in-person survey will miss those not at home and the homeless, and a mail survey will miss those who have moved since the last compilation of addresses was published. With a 40 percent response rate, this study is in line with many other published studies based on mail surveys. Still, the findings cannot be viewed as definitive. Further research, using a combination of survey and experimental methods, should address this latter concern.

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[51] Richard Lacayo, "Violent Reaction," Time 145 (June 12, 1995): 24-30

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APPENDIX

Figure 1. Support for Expression Questions.

Should a person be protected by law when ...

Criticizing the president or other high government officials?

Advocating satanism or other religious cults in public?

Burning the flag to protest actions of the government?

Using words or phrases that would offend people from a different racial or ethnic group?

Taking God's name in vain or saying other sacrilegious things?

Buying magazines, books or videotapes that feature sexually explicit material?

Should the news media (such as newspapers, radio, television and magazines) be protected by law when they ...

Advertise products that are legal but harmful to the public, such as tobacco products?

Criticize U.S. government leaders?

Criticize the military during a war or other international conflict?

Project the winners of an election while people are still voting?

Distribute material of a sexual nature, such as X-rated pictures or movies, to consenting adults?

Keep their sources confidential if a court demands to know the identity of that source?

Figure 2. Media Effects on Self Questions.

Watching a television program that depicts physical violence tends to make me more violent in my personal life.

When I'm deciding which candidates to support during elections, negative campaign ads often persuade me to change my mind.

My opinion toward a political leader (such as the President or the Governor) would be lowered if I read a newspaper article or heard a broadcast report concerning allegations of misbehavior in the official's private life.

My opinion toward a political leader (such as the President or the Governor) would be lowered if I read a newspaper article or heard a broadcast report alleging criminal activity by the official.

Watching a motion picture that depicts physical violence tends to me more violent in my personal life.

My opinion toward a political leader (such as the President or the Governor) would be lowered if I read a newspaper article or heard a broadcast report criticizing the official's performance.

Seeing a film or reading a magazine with sexually explicit content would affect my moral values concerning sex.

Seeing a film or reading a magazine with sexually explicit content would have a negative impact on my attitudes about members of the opposite sex.

TV commercials and other advertisements for particular products often persuade me to purchase those products when I shop.

Figure 3. Media Effects on Others Questions.

Watching a television program that depicts physical violence tends to make other people in general more violent in their personal lives.

When other people are deciding which candidates to support during elections, negative campaign ads often persuade them to change their minds.

The opinions of other people in general toward a political leader (such as the President or the Governor) would be lowered if they read a newspaper article or heard a broadcast report concerning allegations of misbehavior in the official's private life.

The opinions of other people in general toward a political leader (such as the President or the Governor) would be lowered if they read a newspaper article or heard a broadcast report alleging criminal activity by the official.

Watching a motion picture that depicts physical violence tends to make other people in general more violent in their personal lives.

The opinions of other people in general toward a political leader (such as the President or the Governor) would be lowered if they read a newspaper article or heard a broadcast report criticizing the official's performance.

Seeing a film or reading a magazine with sexually explicit content would affect the moral values of other people in general concerning sex.

Seeing a film or reading a magazine with sexually explicit content would have a negative impact on the attitudes of other people in general about members of the opposite sex.

TV commercials and other advertisements for particular products often persuade other people to purchase those products when they shop.

Table 1. Results of Freedom of Expression Questions.

Individuals should have the right to ...

	Frequency	Percent
Criticize president		
Protected all of the time	152	55.3
Protected most of the time	57	20.7
Protected some of the time	37	13.5
Protected very little	10	3.6
Not protected at all	19	6.9
Advocate satanism		
Protected all of the time	76	27.6
Protected most of the time	34	12.4
Protected some of the time	30	10.9
Protected very little	35	12.7
Not protected at all	100	36.4
Burn U.S. flag		
Protected all of the time	68	24.7
Protected most of the time	18	6.5
Protected some of the time	11	4.0
Protected very little	26	9.5
Not protected at all	152	55.3
Use hate speech		
Protected all of the time	77	28.0
Protected most of the time	41	14.9
Protected some of the time	50	18.2
Protected very little	40	14.5
Not protected at all	67	24.4
Say sacrilegious things		
Protected all of the time	86	31.3
Protected most of the time	29	10.5
Protected some of the time	33	12.0
Protected very little	31	11.3
Not protected at all	96	34.9
Buy sexually explicit material		
Protected all of the time	81	29.5
Protected most of the time	43	15.6
Protected some of the time	37	13.5
Protected very little	35	12.7
Not protected at all	79	28.7

Table 1 (continued).

The media should be protected by law when they ...

	Frequency	Percent
Advertise tobacco		
Protected all of the time	99	36.0
Protected most of the time	47	17.1
Protected some of the time	49	17.8
Protected very little	22	8.0
Not protected at all	58	21.1
Criticize government leaders		
Protected all of the time	131	47.6
Protected most of the time	64	23.3
Protected some of the time	46	16.7
Protected very little	7	2.5
Not protected at all	27	9.8
Criticize military during war		
Protected all of the time	80	29.1
Protected most of the time	61	22.2
Protected some of the time	61	22.2
Protected very little	26	9.5
Not protected at all	47	17.1
Project election winners		
Protected all of the time	71	25.8
Protected most of the time	29	10.5
Protected some of the time	34	12.4
Protected very little	23	8.4
Not protected at all	118	42.9
Distribute sexually explicit material		
Protected all of the time	89	32.4
Protected most of the time	39	14.2
Protected some of the time	27	9.8
Protected very little	29	10.5
Not protected at all	91	33.1
Keep sources secret		
Protected all of the time	96	34.9
Protected most of the time	63	22.9
Protected some of the time	39	14.2
Protected very little	24	8.7
Not protected at all	53	19.3

Table 2. Results of Media Effects on Self Questions.

	Frequency	Percent
Official performance		
Strongly agree	9	3.3
Somewhat agree	72	26.2
Neither agree nor disagree	103	37.5
Somewhat disagree	45	16.4
Strongly disagree	46	16.7
Official misbehavior		
Strongly agree	26	9.5
Somewhat agree	109	39.6
Neither agree nor disagree	64	23.3
Somewhat disagree	39	14.2
Strongly disagree	37	13.5
Crime by official		
Strongly agree	67	24.4
Somewhat agree	123	44.7
Neither agree nor disagree	43	15.6
Somewhat disagree	27	9.8
Strongly disagree	15	5.5
Watching violent TV		
Strongly agree	8	2.9
Somewhat agree	12	4.4
Neither agree nor disagree	50	18.2
Somewhat disagree	27	9.8
Strongly disagree	178	64.7
Watching violent movie		
Strongly agree	7	2.5
Somewhat agree	13	4.7
Neither agree nor disagree	47	17.1
Somewhat disagree	22	8.0
Strongly disagree	186	67.6

Table 2 (continued).

	Frequency	Percent
Moral values		
Strongly agree	13	4.7
Somewhat agree	21	7.6
Neither agree nor disagree	50	18.2
Somewhat disagree	23	8.4
Strongly disagree	168	61.1
Attitudes about opposite sex		
Strongly agree	10	3.6
Somewhat agree	22	8.0
Neither agree nor disagree	49	17.8
Somewhat disagree	35	12.7
Strongly disagree	159	57.8
Purchases due to ads		
Strongly agree	16	5.8
Somewhat agree	100	36.4
Neither agree nor disagree	60	21.8
Somewhat disagree	42	15.3
Strongly disagree	57	20.7
Negative political ads		
Strongly agree	11	4.0
Somewhat agree	48	17.5
Neither agree nor disagree	61	22.2
Somewhat disagree	51	18.5
Strongly disagree	104	37.8

Table 3. Results of Media Effects on Others Questions.

	Frequency	Percent
Official performance		
Strongly agree	16	5.8
Somewhat agree	134	48.7
Neither agree nor disagree	90	32.7
Somewhat disagree	27	9.8
Strongly disagree	8	2.9
Official misbehavior		
Strongly agree	32	11.6
Somewhat agree	154	56.0
Neither agree nor disagree	74	26.9
Somewhat disagree	9	3.3
Strongly disagree	6	2.2
Crime by official		
Strongly agree	59	21.5
Somewhat agree	158	57.5
Neither agree nor disagree	51	18.5
Somewhat disagree	4	1.5
Strongly disagree	3	1.1
Watching violent TV		
Strongly agree	30	10.9
Somewhat agree	104	37.8
Neither agree nor disagree	67	24.4
Somewhat disagree	44	16.0
Strongly disagree	30	10.9
Watching violent movie		
Strongly agree	32	11.6
Somewhat agree	97	35.3
Neither agree nor disagree	82	29.8
Somewhat disagree	36	13.1
Strongly disagree	28	10.2

Table 3 (continued).

	Frequency	Percent
Moral values		
Strongly agree	33	12.0
Somewhat agree	76	27.6
Neither agree nor disagree	99	36.0
Somewhat disagree	50	18.2
Strongly disagree	17	6.2
Attitudes about opposite sex		
Strongly agree	22	8.0
Somewhat agree	66	24.0
Neither agree nor disagree	114	41.5
Somewhat disagree	47	17.1
Strongly disagree	26	9.5
Purchases due to ads		
Strongly agree	58	21.1
Somewhat agree	146	53.1
Neither agree nor disagree	57	20.7
Somewhat disagree	9	3.3
Strongly disagree	5	1.8
Negative political ads		
Strongly agree	25	9.1
Somewhat agree	130	47.3
Neither agree nor disagree	83	30.2
Somewhat disagree	25	9.1
Strongly disagree	12	4.4

Table 4. Paired T-Tests on Media Effects Questions for Respondents Exhibiting Third-Person Effect.

	Mean self score	Mean other score	T-value
Official performance	3.17	2.48	9.58
Official misbehavior	2.85	2.23	8.34
Crime by official	2.28	2.00	3.88
Watching violent TV	4.35	2.73	21.13
Watching violent movie	4.41	2.70	23.62
Moral values	4.21	2.74	19.84
Attitudes about opposite sex	4.16	2.90	16.59
Purchases due to ads	3.08	2.06	13.95
Negative political ads	3.69	2.43	14.50

All t-values significant at $p < .001$

N=256

Table 5. Paired T-Tests on Media Effects Questions for Respondents Not Exhibiting Third-Person Effect.

	Mean self score	Mean other score	T-value
Official performance	3.05	3.47	1.80
Official misbehavior	2.36	2.89	2.54[a]
Crime by official	2.15	2.47	1.55
Watching violent TV	3.47	3.36	0.57
Watching violent movie	3.26	3.36	0.62
Moral values	3.15	3.42	1.84
Attitudes about opposite sex	3.63	3.73	0.57
Purchases due to ads	3.15	2.84	2.05
Negative political ads	3.63	3.68	0.27

[a] $p < .05$

N=19

Table 6. Correlation Matrix for Third-Person and Freedom of Expression Scales.

	1	2	3	4
1. Third person	1.00			
2. Effects on others	-.44[a]	1.00		
3. Effects on self	.52[a]	.52[a]	1.00	
4. Freedom of expression	.12[b]	-.36[a]	-.22[a]	1.00

[a] $p<.001$
[b] $p<.01$

Televising Executions: A Prisoner's Right of Privacy

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Submitted to:

Law Division--Association for Education in Journalism and Mass Communication

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Televising Executions: A Prisoner's Right of Privacy

Not long ago the words "dead man walking" were shouted by guards whenever a condemned man left his cell on death row for the last time.[1] The recently released movie "Dead Man Walking"[2] stars Sean Penn who portrays a killer, Matthew Poncelet, on death row. Penn's character is a composite of Elmo Patrick Sonnier and Robert Lee Willie who were both executed at the Louisiana State Penitentiary, known as "Angola." The movie is based on Sister Helen Prejean's book *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*,[3] which is a personal account of her role as spiritual advisor to Sonnier and Willie while they were on death row.

In 1980, Prejean's religious order, the Sisters of St. Joseph of Medaille, made a commitment to "stand on the side of the poor."[4] This commitment led Prejean and others in her order to live and work in St. Thomas, which is a poor, Black housing project in New Orleans.[5] Prejean's work with death-row inmates began in 1982, when a friend working for the Louisiana Prison Coalition asked her if she would like to become a pen-pal to someone on death row.[6] She agreed and was given the name and address of the prisoner she was to write: "Elmo Patrick Sonnier, number 95281, Death Row, Louisiana State Penitentiary, Angola."[7]

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[1] Helen Prejean, C.S.J., *Capital Punishment: The Humanistic and Moral Issues*, 27 ST. MARY'S L.J. 1, 18 (1995) (sixth annual Dean's Lecture).

[2] DEAD MAN WALKING (Gramercy Pictures 1996) (Script by writer/director Tim Robbins).

[3] HELEN PREJEAN, C.S.J., DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993).

[4] *Id.* at 5.

[5] *Id.* at 6.

[6] *Id.* at 3.

[7] *Id.* at 4.

Sonnier and his brother Eddie had been convicted of the 1977 murders of a teenage couple they kidnapped from a lovers' lane. They raped the girl, forced the couple to lie face down, and shot them both in the head. Although Eddie received a life sentence, Sonnier received the death penalty and died in the electric chair on April 5, 1984.[8]

In October 1984, six months after Sonnier's death, Prejean agreed to be the spiritual advisor to another death-row inmate, Robert Lee Willie.[9] Willie and an accomplice named Joseph Vaccaro had gone on an eight-day crime spree that had left a teenage girl dead after being raped and stabbed, another teenage girl raped, and her boyfriend paralyzed.[10] Vaccaro received a life sentence. Willie received the death penalty and died in the electric chair on December 28, 1984.[11]

As a result of her work as spiritual advisor to Sonnier and Willie, Prejean has become an ardent spokeswoman for the right to life of those who have extinguished the lives of others. In explaining her point of view, she touches upon many of the controversial issues that surround the death penalty. Prejean argues that the death penalty "costs more than life imprisonment," fails as a deterrent because it is "too selective and capricious," and it is "racially biased."[12] Ultimately, she argues that "If we believe that murder is wrong and not admissible in our society, then it has to be wrong for everyone, not just individuals but governments as well."[13]

As an alternative to the death penalty, Prejean recommends "nonnegotiable long-term imprisonment."[14] She argues that the public is ignorant about the death penalty, and if this were not the case, the public would also support this alternative. However, she believes the public's ignorance is not an accident and the "secrecy surrounding executions makes it possible for executions to continue."[15] Prejean argues that "[I]f executions were made public, the torture and violence would be unmasked, and we would be shamed into abolishing executions."[16]

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[8] *Id.* at 17, 54.

[9] *Id.* at 117.

[10] *Id.* at 119.

[11] *Id.* at 211.

[12] *Id.* at 130.

[13] *Id.*

[14] *Id.* at 143.

One possible way of making executions public is by televising them, which Prejean considers a viable action.[17] She notes that inmates appear to be "abstractions of evil" while they are on death row.[18] As long as they are abstract, Prejean contends that "[T]hey can be turned into 'monsters whose lives can be terminated.'"[19]

Proposals to televise executions have garnered national attention since the mid 1970s.[20] The discussions that have occurred are primarily from a legal standpoint involving First Amendment rights. A First Amendment right of media access to state executions has never been established by the United States Supreme Court. However, a substantial number of states have legislation that provides for the presence of media at executions.[21] Nonetheless, no state to date has ever allowed the filming of an execution for the purpose of being broadcast. But, what if a state's legislature were to pass a law that allows such an action? At that point it would be the media's duty to decide whether it is ethical to televise an execution.

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[15] *Id.* at 197.

[16] *Id.*

[17] *See* Peter Hebblethwaite, *Stark Images of Life, Death on Death Row: Sr. Helen Prejean, author of 'Dead Man Walking,'* NAT'L CATH. REP., July 29, 1994, at 5.

[18] *Id.*

[19] *Id.*

[20] *See infra* pp. 10-21.

[21] *See e.g.*, ALA. CODE § 15-18-83 (1975); CONN. GEN. STAT. ANN. § 54-100 (1994); FLA. STAT. ANN. § 922.11 (West Supp. 1996); KY. REV. STAT. § 431.250 (Michie Supp. 1994); MISS. CODE ANN. § 99-19-55 (1994); OHIO REV. CODE ANN. § 2949.25 (Page 1993); OKLA. STAT. ANN. tit. 22, § 1015 (West Supp. 1996); S.D. CODIFIED LAWS ANN. § 23A-27A-34 (1988); UTAH CODE ANN. § 77-19-11 (1995).

The purpose of this study is: (1) to discuss the development of case law and legislation on the issue of televising executions, and (2) to discuss the legal implications of televising executions vis-a-vis a prisoner's countervailing right to privacy under state and federal constitutional law. Because of the attention that Prejean's *Dead Man Walking* has attracted to her home state of Louisiana, and because she argues that executions should be made public, this study uses Louisiana constitutional law in its discussion.

Literature

Although no execution has been televised in the United States, there have been a few occasions when the print media have published photos of executed prisoners. For example, in 1928, reporter Tom Howard represented the tabloid *New York Daily News* at the execution of Ruth Snyder who was convicted of strangling her husband.[22] Wearing a pair of baggy bell-bottom pants, Howard strapped a miniature camera to his ankle. Using a cable release controlled from his pocket he tripped the shutter of the camera as the executioner sent 2,300 volts of electricity through Snyder's body. The newspaper printed the picture on the front page. As a result the paper doubled its daily circulation and profited greatly.[23] Similarly, in 1982, both the *Huntsville Item* and *Newsweek* published photographs of Charlie Brooks' body after his execution.[24] In addition, the syndication rights were sold overseas for $10,000.[25] Also, in 1989, the *Weekly World News* published photographs of Ted Bundy which show burns on his body caused by electrodes.[26] The photographs were taken after the required autopsy had been performed.[27] And, in 1990, Louisiana State Penitentiary's news magazine, *The Angolite*, printed two photographs of Robert Wayne Williams' body after his execution.[28] The photographs show first, second, third, and fourth degree burns on the body's head and legs where the electrodes were attached.[29] Of these four incidents, only the photograph of Ruth Snyder was taken by a news reporter in the death chamber.

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[22] Richard Ek, *Pictures at an Execution*, S.F. CHRON., Apr. 28, 1991, at Z15.

[23] *Id.*

[24] Booth Gunter, *Death Watch*, THE QUILL, Sept. 1983, at 20.

[25] *Id.*

[26] WEEKLY WORLD NEWS, Feb. 21, 1989, at 46-47.

Recently, there has been an increase in articles from the legal community arguing for the press's right to televise executions. These arguments focus primarily on legal issues surrounding journalists' First Amendment rights, the public's interest in newsworthy events, and the historical fact that the press has almost always been present at executions.[30] Most of these articles conclude that the public must be able to view executions to make informed decisions on the death penalty's validity, and that television is the best method of accomplishing this task.[31] In addition, the majority of these articles barely consider the countervailing legal issues regarding the privacy rights of the condemned.[32] However, the journalism community has added to the discussion of a prisoner's right to a private execution by addressing the ethical concerns.[33]

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[27] *Id.* at 47.

[28] Ron Wikberg, *The Horror Show*, THE ANGOLITE, Sept./Oct. 1990, at 35. The editors noted that although they had access to 59 photographs of executed prisoners, only two were being published because more than that "would serve no useful editorial purpose." *Id.* at 34.

[29] *Id.*

[30] *See, e.g.*, John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355 (1993); Michael Madow, Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York, 43 Buff. L. Rev. 461 (1995); Neil E. Nussbaum, *"Film at Eleven. . ."--Does the Press Have the Right to Attend and Videotape Executions?*, 20 N.C. CENT. L.J. 121 (1993); Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 U.C.L.A. L. Rev. 381 (1992); Bernard Schwartz, *Death TV? Is There a Press Right of Access to News that Allows Television of Executions?*, 30 TULSA L.J. 305 (1994); William Bennett Turner & Beth S. Brinkmann, *Televising Executions: The First Amendment Issues*, 32 SANTA CLARA L. REV. 1135 (1992); Jeff Angeja, Note, *Televising California's Death Penalty: Is There a Constitutional Right to Broadcast Executions?*, 43 HASTINGS L.J. 1489 (1992); Comment, *Broadcasters' News-Gathering Rights Under the First Amendment: Garrett v. Estelle*, 63 IOWA L. REV. 724 (1978); Dane A. Drobny, Note, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179 (1992); Patrick D. Filbin, Comment, *"Pictures at an Execution,"* 9

Although few articles from the legal community address the countervailing interest in a prisoner's private execution, support for this right can be found. However, Bessler notes the Supreme Court is unlikely to allow a condemned inmate's privacy interests to outweigh those of the public or the states.[34]

T.M. Cooley L. Rev. 137 (1992); G. Mark Mamantov, Note, *The Executioner's Song: Is There a Right to Listen?*, 69 Va. L. Rev. 373 (1983); Gil Santamarina, Note, *The Case for Televised Executions*, 11 Cardozo Arts & Ent. L.J. 101 (1992); Jerome T. Tao, Note, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 Geo. Wash. L. Rev. 1042 (1992).

The press has almost always been present at executions. However, in 1881, the press was excluded from the execution of four prisoners at Sing Sing Prison. The prison warden positioned armed guards and dogs outside the prison and ordered that any reporter who attempted to cross a designated "dead line" should be shot. Micheal Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 Buff. L. Rev. 461, 546 (1995) (citing *They Still Await Death*, N.Y. Times, July 7, 1891, at 1).

[31] *But see* Drobny, *supra* note 30 (concluding the press does not have a First Amendment right to attend or televise an execution); Filbin, *supra* note 30 (concluding televising executions would only fan the death penalty debate with emotion). *See also*, Madow, supra note 30, at 560 (questioning whether televising executions may lead society back to the "rituals of Hanging Day" while failing to address the issue of whether the death penalty is proper).

[32] However, *see*, Angeja, *supra* note 30, at 1508; Bessler, *supra* note 30, at 416-17; Mamantov, *supra* note 30, at 401-02.

[33] *See, e.g.*, Dan Fost, *Death Watch*, Colum. Journalism Rev., Mar./Apr. 1991, at 15-16.

[34] Bessler, *supra* note 30, at 416.

Drawing an analogy to the holding in *Cox Broadcasting Corp. v. Cohn*,[35] Bessler argues it is unlikely the Court will "preserve the privacy of a notorious criminal in the face of the public's right to know about his or her execution."[36] He argues this is likely because the Court has already "favored the press in [the] 'sphere of collision' between privacy and free press claims," especially when the privacy at stake in *Cox Broadcasting Corp.* concerned the name of a rape victim and not a convicted murderer.[37] Further, Bessler argues that if legislatures recognize a prisoner's right to a private execution and the prisoner waives this right, it would be unconstitutional to require the execution to be private.[38]

Similarly, Mamantov believes a prisoner may have an enforceable right to a private execution, but this right should be waiveable by the prisoner.[39] If this right is waived by the prisoner, the press should be allowed access to the execution, although he further argues any interest the state may have in excluding recording devices should outweigh the press's countervailing rights to record the event.[40]

Contrarily, Jeff Angeja believes prisoners should not have a right to private executions.[41] He argues that although a death-row inmate may not intentionally seek the public spotlight, he eventually becomes a public figure as a result of being arrested, indicted, and tried, during which the inmate's private life is publicly exposed and scrutinized.[42] Thus, as a public figure the inmate has a diminished expectation of privacy over which the First Amendment should prevail.[43]

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[35] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[36] Bessler, *supra* note 30, at 416.

[37] *Id.* at 417 (citing *Cox*, 420 U.S. at 491).

[38] *Id.* at 418.

[39] Mamantov, *supra* note 30, at 401.

[40] *Id.* at 402.

[41] Angeja, *supra* note 30, at 1508.

[42] *Id.* (citing David N. Kuriyama, *The "Right of Information Triangle": A First Amendment Basis for Televising Judicial Proceedings*, 4 U. HAW. L. REV. 85, 133 (1982) (citing Herald Price Fahringer, *Cameras in the Courtroom: TV or not TV?--That is the Question*, TRIAL DIPLOMACY J., Winter 1980-81, at

The journalism community has added to the discussion of privacy rights and televised executions with its ethical concerns. Professor George Gerbner, emeritus dean of the University of Pennsylvania's Annenberg School for Communications, said that the idea of televising any execution or murder is "outrageous."[44] Further, he stated, "There are certain moments that should be private, and one of them is dying. And the claim that this helps dramatize the suffering is specious."[45] James Martin added that "Even with network warnings and even in the interest of accuracy and truth, there should be limits. Death is, after all, a supremely private moment, and perhaps the public's right to know in this instance is outweighed by the sanctity of the individual."[46]

In general, journalists have focused on the privacy rights of the prisoner's and victim's families, witnesses, and prison employees instead of those of the prisoner. Notably, columnist William F. Buckley, Jr. has stated the most compelling reason to ban televising executions is because of the rights of the victim's family, which is the most "directly aggrieved."[47] Similarly, Marlin Shipman agrees journalists should not only consider the privacy concerns of the prisoner, but mainly those of the condemned's and victim's families.[48] Shipman argues the execution is likely to be a "time of grief, personal loss, and emotional distress" for family members.[49] Thus, journalists should be sensitive to

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4, 5)).

[43] *Id.*

[44] James Martin, *A Death in the Family: TV Sensationalization of Murder and Death*, AMERICA, Nov. 12, 1994, at 24 (quoting Professor George Gerbner).

[45] *Id.* (quoting Professor George Gerbner).

[46] *Id.*

[47] William F. Buckley, Jr., *Televising Executions?*, NAT'L REV., June 24, 1991, at 55.

[48] Marlin Shipman, *Ethical Guidelines for Televising or Photographing Executions*, 10 J. MASS MEDIA ETHICS 95, 105 (1995).

[49] *Id.*

news sources during this period. If family members want to view the execution, they may do so in some states by being witnesses.[50]

In 1991, Michael Schwarz, director of current affairs at KQED, Inc., a PBS television station in San Francisco, noted while the station was trying to gain the right to televise Robert Alston Harris' execution, the prisoner's privacy rights were a concern for KQED.[51] He said for moral and ethical reasons the station would not televise an execution if the prisoner did not agree to the act. He noted no matter how terrible the prisoner's crime was, the prisoner's moment of death deserves some measure of respect. Nevertheless, Schwartz said the station did not concede any legal right to the prisoner's privacy.[52]

Discussion

The execution of an inmate is without question a matter of public importance--and there is widespread public support for capital punishment. More than 70% of the American public favors the death penalty.[53] However, as Prejean argues in *Dead Man Walking*, this support may be overstated.[54] Prejean cites a 1986 Gallup poll that indicates support for the death penalty drops to 43% when those surveyed are asked to compare the death penalty to the alternative of life in prison without parole.[55] Nonetheless, statistics show opposition to the death penalty on moral grounds is small regardless of the circumstances of the case.[56]

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[50] *Id.*

[51] Fost, *supra* note 30.

[52] *Id.*

[53] BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF JUSTICE STATISTICS 1993, at 200-01 (Kathleen Maguire & Ann L. Pastore eds., 1994).

[54] PREJEAN, *supra* note 3, at 116. *See also*, James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 525 (1990-91) (summarizing Amnesty International polls).

[55] *Id.*

In addition to the polls, the public in California has shown its support for the death penalty by utilizing its voting power to oust justices of the state's supreme court.[57] In 1986, Chief Justice Rose Bird was recalled when she was held responsible for the court's only affirming five death sentences in a seven-year period.[58] Further, Associate Justices Joseph Grodin and Cruz Reynoso were also recalled because they were viewed as opponents of the death penalty.[59]

Proposed Legislation

As the public's support for capital punishment remains strong, and the number of articles on the subject continues to grow, there is an increasing move in state legislatures and Congress to allow televising. Although there have been recent proposals in both state and federal legislatures, no legislation has ever been passed which would allow executions to be televised. For instance, a bill that would have allowed executions to be televised was introduced in the Georgia House Committee on State Institutions and Property in January 1991.[60] The bill provided for the Department of Corrections to make suitable arrangements to provide suitable facilities to allow any public or private television broadcaster to televise executions.[61] Further, the bill provided the State Board of Education should arrange for the televising of executions as a part of the public broadcasting of the state-wide network of public school education television stations.[62]

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[56] Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 32 n.15 (1995). This fact undermines Justice Marshall's claim in *Furman* that the death penalty is "morally unacceptable to the people of the United States." *Id.* (citing Furman v. Georgia, 408 U.S. 238, 360 (1972)).

[57] Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 Loy. L.A. L. Rev. 237, 237-38 (1989).

[58] *Id.*

[59] *Id.*

[60] 1991 Ga. H.B. 110.

[61] *Id.*

In April 1991, a bill was introduced by California's State Assemblyman John Burton.[63] This bill authorized members of the news media to be present at executions and to record the execution with the permission of the defendant.[64] At the same time the California bill was introduced, a similar bill was under consideration in Florida.[65] In addition, in May 1991, a bill was introduced in the United States Senate Committee on Judiciary by Senator Mark Hatfield that required executions under federal law be "convenient for members of the public to view. . . and for the communications media to broadcast."[66] Most recently, in February 1994, a bill was introduced in the Maryland House Committee on Judiciary.[67] This bill provided for public access to executions and for the public broadcast of executions on Maryland Public Television.[68]

Case Law

There have been several requests to televise executions, indicating a steady push to accomplish what at one time was thought to be an "ultimately absurd First Amendment argument."[69]

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[62] *Id.*

[63] 1991 Cal. A.B. 2246. *See also*, Philip Hager, *U.S. Judge Upholds Ban on TV Cameras at Executions*, L.A. TIMES, June 8, 1991, at A1.

[64] *Id.*

[65] Bill Halldin, *House Panel Foresees Call for TV Executions*, TAMPA TRIB., July 9, 1991, at 1.

[66] S. 1155, 102d Cong., 1st Sess. (1991). *See also*, 137 CONG. REC. S6654 (daily ed. May 23, 1991) (statement of Sen. Hatfield).

[67] 1994 Md. H.B. 1149.

[68] *Id.*

[69] JESSE H. CHOPPER ET AL., 1 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 197 (1981).

Garrett v. Estelle (1977)

In *Garrett v. Estelle*,[70] Tony Garrett, a television reporter for Public Broadcasting System's station KERA, Channel 13, of Dallas, Texas, sought to enjoin the Texas Department of Corrections from preventing the filming of the state's first execution since 1964.[71] Before the United States District Court, the State of Texas argued its decision to prohibit the filming of the execution was justified based on the Supreme Court's opinions in *Pell v. Procunier*[72] and *Saxbe v. Washington Post Co.*[73] Both cases upheld regulations barring the press from prearranged interviews with individually selected prisoners.[74] However, the court noted four distinctions between *Garrett* and the earlier *Pell* and *Saxbe* cases.

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[70] Garrett v. Estelle, 424 F. Supp. 468 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

[71] *Id.* at 473.

[72] Pell v. Procunier, 417 U.S. 817 (1974). In *Pell*, several California State Prison inmates and members of the press challenged a section of the California Department of Corrections Manual as violative of the First and Fourteenth Amendments. *Id.* at 819-21. The Manual disallowed interviews with "specific individual" inmates because it was believed inmates singled out by the press would achieve certain celebrity status within the prison, thus disrupting prison discipline. *Id.* at 832. The press did not base its claim on any prisoner rights. Instead, the press claimed that the regulation unconstitutionally denied the press its right to a newsworthy source of information. *Id.* at 829-30. The United States Supreme Court found the regulation did not violate First Amendment rights. The Court stated that because the general public was not given this type of access, neither must the press be given this type of access. *Id.* at 831.

[73] Saxbe v. Washington Post Co., 417 U.S. 843 (1974). *Saxbe*, decided the same day as *Pell*, upheld the following Federal Bureau of Prisons policy statement:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

The first distinction between the cases was that *Pell* and *Saxbe* involved the reporting of day-to-day prison operations.[75] In contrast, *Garrett* involved "one of the most important and controversial public issues of the day."[76] The court stated the media "must have access to the dungeons and the 'death rows' so that the people remain aware of the workings of their government."[77] Further, the court stated, "If there is any subject about which the people have a 'right to know,' surely it is this."[78]

The second distinction was that in *Pell* and *Saxbe* the public's right to know was not significantly interfered with by restricting the press.[79] In both cases the press had access to the prisons through regularly arranged tours which allowed photographs and interview sessions with inmates. Further, the media were able to interview recently released inmates. However, in *Garrett* the court found little opportunity for the public to learn about the execution. All access to inmates on death row for purposes of photographs and/or interviews was forbidden, public witnessing of the execution was forbidden, and, of course, inmates could not be interviewed after the punishment.[80]

The third distinction was there was evidence in *Pell* and *Saxbe* that restrictions on interviews were needed for security reasons.[81] Conversely, the court in *Garrett* found no similar evidence. In addition, any evidence in *Pell* and *Saxbe* that the media interfered with rehabilitation of the prisoners did not apply to

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[74] *See supra* notes 72, 73.

[75] *Garrett*, 424 F. Supp. at 471.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

Garrett because death row inmates were not imprisoned to be rehabilitated.[82]

The fourth distinction dealt with the Supreme Court's concern in *Pell* and *Saxbe* that interviews might interfere with the deterrent factor of imprisonment.[83] The court in *Garrett* decided this issue was not a concern when dealing with inmates on death row.[84]

The court opined the distinctions between print and electronic news media that had been made in the past were not applicable in the coverage of an execution.[85] Referring to *Estes v. Texas*,[86] the court noted the primary difference between print and electronic media access to public events has involved the coverage of trials.[87] Cameras are frequently excluded from trial because it is believed they tend to disrupt the proceedings, distract jurors, influence witnesses, harass and prejudice the defendant, and make it more difficult for a judge to guarantee a fair trial.[88] However, the court distinguished an execution from a trial noting that an execution is a mechanical process conducted after the deliberative process has been completed.[89] The court reasoned that one reporter with a quiet, compact and portable film camera requiring no special lighting could in no way disrupt or interfere with the execution.[90]

The court then discussed what it felt was the actual concern over televising executions. This concern was that the broadcast of the execution would be an "'offense to human dignity,' 'distasteful,' or

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 472.

[86] Estes v. Texas, 381 U.S. 532 (1965).

[87] *Garrett*, 424 F. Supp. at 472.

[88] *Id.*

[89] *Id.*

[90] *Id.*

'shocking.'"[91] Acknowledging this might be true, the court noted the real question was whether such decisions were to be made by the government or by the media's news directors.[92] The court reasoned that allowing the government to make such decisions might end with the media being "barred from other public facilities where public officials are involved in illegal, immoral, or other improper activities that might be 'offensive,' distasteful,' or otherwise disturbing to viewers of television news."[93] Citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[94] the court reasoned it is the news media's job to determine what governmental activities are "tasteful, dignified, or acceptable to be reported."[95] The court then noted the Supreme Court has observed:

> That editors--newspaper and broadcast--can and do abuse . . . (the power to select and choose news material) is beyond doubt, but that is no reason to deny this discretion . . .. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility and civility on the part of those who exercise the guaranteed freedoms of expression."[96]

The court further reasoned that any distasteful or shocking effects to viewers from televising executions were not a serious problem, because the viewers themselves are the "final masters of what news they consume; they have the most effective tools with which to shield themselves from reports they consider unacceptable . . . selective television viewing."[97]

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). Chief Justice Burger, writing for the majority of the Court, held that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. *Id.* at 121-33. In reaching this conclusion Burger stated that, "Congress appears to have concluded. . . that of these two choices--private or official censorship--Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one to be most avoided." *Id.* at 105.

[95] *Garrett*, 424 F. Supp. at 473.

[96] *Id.* (citing *Columbia Broadcasting System, Inc.*, 412 U.S. at 124-25).

Thus, the court ruled Garrett could have access to the execution for purposes of filming the event, provided he agreed to act as pool representative for the electronic media, and to provide, at cost, copies of the film to other representatives of the news media.[98] The court reasoned the carrying out of the death penalty is the ultimate act of the state and the collective wills of all the people who, in a democratic society, should have as much information as possible regarding such an act.[99] The court concluded the most effective way to achieve the task of informing the public was with the electronic media which have become an integral part of the national communication system.[100]

On appeal, the United States Court of Appeals for the Fifth Circuit overruled the district court.[101] The court of appeals noted that in *Holden v. Minnesota* [102] the Supreme Court had upheld the right of a state to restrict the attendance at executions, and in *Pell* and *Saxbe* the Court had found the press had no greater right of access to information than the public at large.[103] Accordingly, the court chose not to frustrate the official policy of the State of Texas by allowing news cameramen the right to film executions.[104]

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977).

[102] Holden v. Minnesota, 137 U.S. 483, 491 (1890). The Supreme Court upheld Minnesota's regulations restricting the rights of the public generally, and excluding all reporters or representatives of newspapers specifically. *Id.* at 491. Further, the Court upheld the restriction on the press that "No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper." *Id.* at 486.

[103] *Garrett*, 556 F.2d at 1280.

Halquist v. Department of Corrections (1989)

In *Halquist v. Department of Corrections*,[105] an independent producer of radio and television documentaries sought the right to broadcast the execution of Charles Campbell. When permission was refused, the plaintiff brought suit to compel access.[106] The first issue before the court was whether the state's constitution provided a general right of access to the execution.[107] The court simply concluded there was a lack of precedent on the issue.[108] Similarly, the court disposed of the second issue quickly, stating because there was no general right of access to executions, the press did not have a right to videotape them under the state's constitution.[109]

The third issue before the court was similar to one before the court in *Garrett*.[110] The plaintiff's argument was that because twelve members of the press customarily had access to viewing executions, the filming ban operated as a restriction on the methods the press could use to disseminate the information they had gathered at the executions.[111] The court reject this argument and concluded, "It follows that a taping ban is a limitation on access to substantive information, not a limitation on dissemination."[112] Thus, the court ruled that because there was a substantive difference between viewing and taping executions, the state could allow access to viewing without having to provide access to videotape.[113]

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[104] *Id.*

[105] Halquist v. Department of Corrections, 783 P.2d 1065, 1065 (1989).

[106] *Id.* at 1066

[107] *Id* at 1065-67.

[108] *Id* at 1065-67.

[109] *Id.* at 1066.

[110] *See supra* pp. 12-17.

[111] *Halquist*, 783 P.2d at 1067.

[112] *Id.*

It should be noted that restrictions on prison access can not be based on the communications content that is involved.[114] Thus, if the Supreme Court of Washington is correct that film includes "substantive information" that other forms of reporting or access do not, the United States Court of Appeals for the Fifth Circuit's ruling in *Garrett* cannot logically stand.[115]

***KQED, Inc. v. Vasquez* (1991)**

In *KQED, Inc. v. Vasquez*,[116] San Francisco-based public television station KQED sued the State of California for the right to videotape the execution of Robert Alton Harris, who was to be the first man to be executed in California since 1967.[117] The station did not want to broadcast the execution live, but intended to use the film as part of a documentary about capital punishment.[118] When KQED's request was turned down, it filed suit.[119] In response, the warden barred all members of the press from attending the execution.[120]

The State of California said the prison should be able to keep the press from attending if necessary for the warden to be able to "retain control of operations of the prison."[121] Further, the State argued the execution should not be televised, primarily because of security.[122] First, many inmates had television sets in their cells, and viewing the execution could cause a riot or retaliation against the guards.[123] Second, prison officials were concerned the identities of the witnesses, guards and other staff present at the execution would be revealed by the cameras, thus jeopardizing their safety and that of their families.[124] Third, prison officials expressed concern that a camera could come in contact with the gas chamber's protective screen, causing a gas leak.[125] In fact, the judge noted a press member could throw a camera through the glass: "It's no answer to say the press are all nice people and would never do anything irrational."[126]

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[113] *Id.*

[114] *Pell*, 417 U.S. at 826.

[115] Jerome T. Tao, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 Geo. Wash. L. Rev. 1042, 1065 (1992).

[116] KQED, Inc. v. Vasquez, No. C90-1383 RHS, 1991 U.S. Dist. LEXIS 21163 (N.D. Cal. June 7, 1991).

[117] Karl Olson Erin Daily, *Death on Video: Should Executions be on the Eleven O'Clock News?*, Manhattan Law., Apr. 1991, at 13.

[118] Victoria Slind-Flor, *Film at 11? Lawyers Debate TV Executions*, Nat'l L.J., June 10, 1991, at 8.

[119] Hager, *supra* note 63, at A1.

[120] *Id.*

The court held the State could bar cameras, but reporters must be permitted to attend the execution and be allowed to bring notebooks, pens and pencils.[127] As the court of appeals had found in *Garrett*, the court here reasoned the media had no greater right of access than that of the general public, and therefore restrictions such as banning cameras was reasonable.[128]

Just before Harris' execution, a United States district judge ordered that the execution be videotaped by a defense investigator.[129] The purpose of the order was so the judge could view the tape to determine whether the gas chamber was a cruel and unusual punishment.[130] The judge stated in her order that "Evidence critical to [Harris'] claim that execution by lethal gas is tortuous, painful and cruel in violation of the Eighth Amendment will be irretrievably lost unless the impending execution is videotape recorded."[131] The tape of Harris' execution has not been made available to the public. However, the ordered tape opens the door for legal challenges that lawyers for news organizations believe is now weighing in their favor which may be an official record requiring its release.[132]

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[121] Slind-Flor, *supra* note 118.

[122] Hager, *supra* note 63.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *KQED, Inc.*, 1991 U.S. Dist. LEXIS 21163 at 12.

[128] *Id.*

[129] Philip Hager, *Should Tape of Harris Execution be Released?*, L.A. TIMES, at A3.

Lawson v. Dixon (1994)

In February 1994 NBC aired a fictional television movie "Witness to the Execution"[133] about a pay-per-view channel that pays the state to be allowed to cover an execution to boost ratings. When asked his opinion about the movie, syndicated talk-show host Phil Donahue told a television interviewer, "I would be pleased to have an execution on the Donahue show. What's wrong with it? . . . Let's see future bad guys watch these people fry right here on television."[134]

If Donahue would have had his way, on June 15, 1994, families would have been gathered around the television watching the execution of David Lawson, who was convicted in 1980 of killing a man while burglarizing his home. In an attempt to televise Lawson's execution, Lawson and Donahue appealed to North Carolina's Supreme Court,[135] arguing that Lawson wanted his life's story,

> [T]o serve as an example to others of the effects of child abuse, clinical depression and the dangers inherent in a life of crime; and that the story of his life and death be used as an educational medium to aid in the prevention of crime and hopefully as a deterrent to others who might fall into the same lifestyle or patterns of conduct.[136]

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[130] *Id.*

[131] *Id.*

[132] Hager, *supra* note 63.

[133] *Witness to the Execution* (NBC television broadcast, Feb. 1994).

[134] *See* John Carmody, *The TV Column*, THE WASH. POST, May 06, 1994, at B06.

[135] Lawson v. Dixon, 336 N.C. 312, *reh'g denied*, 445 S.E.2d 404 (N.C. 1994).

[136] Carmody, *supra* note 134.

They further argued that filming Lawson's execution would "make a meaningful contribution to the public debate over the use of the death penalty."[137]

Was this just an attempt at more-sensational ratings? Not according to Donahue. Donahue claimed his motivation was to inform the public so that it may decide whether capital punishment is right or wrong.[138] Regardless of Donahue's true motivations, Lawson's execution was not filmed. The court held Donahue did not have a right under the First or Fourteenth Amendments to the United States Constitution or under Article 1, Section 14, of the North Carolina Constitution to audiotape or videotape executions.[139] The court noted that according to state statute, executions were under the supervision and control of the warden, and as a matter of law the warden could not be forced to permit the requested audio-taping or videotaping.[140]

Prisoners' Fundamental Right of Privacy

Although there have been no state-authorized televised executions, the ability to do so may soon become reality. As noted above, there has been a move within the federal judiciary, state legislatures, Congress, academia, and the media to allow televising executions. However, as shown by the outcome of the cases discussed above,[141] courts have been reluctant to find a First Amendment right to televise executions. Rather, state legislatures will most likely have to pass statutes that allow the act.

If a state statute is passed authorizing televised executions, there will likely be prisoners who will claim a countervailing right to privacy. Further, it is likely some broadcasters will disregard the prisoner's claim, and televise the execution anyway. Thus, as the discussion over televising executions continues, the question of whether an execution can be televised may one day become, "[W]hy *not* televise it?"[142] Not recognizing a prisoner's countervailing right to privacy may be found unconstitutional because there may be no compelling state interest that would be furthered by televising executions.

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[137] *Id.*

[138] Christopher Johns, *Televising the Judicial Murder of People*, ARIZ. REPUBLIC, July 31, 1994, at H1.

[139] *Lawson*, 336 N.C. at 312.

[140] *Id.* at 313.

[141] *See supra* pp. 11-21.

The federal constitution provides an "irreducible minimum level of protection" for its guarantees because of the supremacy of federal law.[143] This minimum level of protection may be added to with state constitutional guarantees if those additional state guarantees do not conflict with the federally protected rights of others.[144] This relationship between the federal and state guarantees does not change regardless of which source of guarantees is considered first.[145]

However, the United States Supreme Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."[146] In addition, the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[147] Thus, the Court is not in the habit of deciding "questions of a constitutional nature unless absolutely necessary to a decision of the case."[148] Further, the Supreme Court's "Pullman doctrine" holds a federal court may avoid proceeding with a federal constitutional question if the case may be resolved on questions of state law.[149]

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[142] Choper et al., The Supreme Court: Trends and Developments--1979-1980: An Edited Transcript of the Second Annual Supreme Court Review and Constitutional Law Symposium 198 (Dorothy Opperman ed. 1981) (emphasis in original).

[143] John Devlin, *Louisiana Constitutional Law, Developments in the Law: 1992-1993*, 54 La. L. Rev. 683, 684 (1994).

[144] *Id.* (citing Runeyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[145] *Id.*

[146] Webster v. Reproductive Health Services, 492 U.S. 490, 525-26 (1989) (O'Connor, J., concurring) (citing Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885))).

[147] *Id.* at 526 (quoting *Ashwander*, 297 U.S. at 347).

[148] *Id.* (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

Therefore, as noted by the Louisiana Supreme Court in *State v. Perry*,[150] "an improper by-pass of a state constitutional or legal question by [a state's highest] court may result in an unnecessary federal constitutional decision, a remand by the Supreme Court, or both."[151] Avoiding unnecessary federal constitutional decisions would promote greater judicial efficiency.[152] Further, considering a state constitutional issue first "assures that state constitutional rights guarantees will receive the independent consideration they deserve, without losing the benefit of the 'floor' of individual rights provided by the federal Bill of Rights."[153] Therefore, this paper will first discuss the issue of televising an execution against a prisoner's countervailing right of privacy in light of Louisiana constitutional law, and then discuss the issue in light of federal constitutional law.

In a law review article in 1890, Samuel Warren and Louis D. Brandeis introduced the concept of a constitutional right of privacy.[154] They took issue with the intrusions by the press into an individual's private life. Urging the courts to adopt a right of privacy they argued each person has a legal interest in a physical and emotional private life. In 1928, in a dissenting opinion in *Olmstead v. United States*,[155] Justice Louis Brandeis defined the constitutional right of privacy as the "right to be let alone--the most comprehensive of rights and the right most valued by civilized men."[156]

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[149] Texas v. Pullman, Co., 312 U.S. 496, 498 (1941).

[150] State v. Perry, 610 So. 2d 746 (1992) (Dennis, J.).

[151] *Id.* at 750.

[152] *Id.*; *See, e.g.*, Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986); City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985); *See also Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1448 (1982).

[153] Devlin, *supra* note 143, at 731 n.27.

[154] Samuel Warren & Louis D. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev 193 (1890).

[155] Olmstead v. United States, 277 U.S. 438 (1928).

During the beginning of this century the United States Supreme Court held the freedom to make decisions which did not adversely affect legitimate state interests was a liberty protected by the due process clause.[157] Although substantive due process no longer imposes serious restraints on economic regulations as it did in its original form, the Supreme Court still uses the notion to protect certain fundamental personal rights which are not enumerated in the Constitution.[158]

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[156] *Id.* at 478 (Brandeis, J., dissenting).

[157] Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974). Although the Constitution does not expressly guarantee the right to privacy, the Supreme Court created substantive due process in which "liberty" and "due process" were interpreted to imply individual autonomy. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897). In *Allgeyer*, the Supreme Court noted:

> The liberty mentioned [in the due process clause of the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will tumble to earn his livelihood by any lawful calling; to pursue any likelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589.

See also Meyer v. Nebraska, 262 U.S. 390 (1923). In *Meyer*, the Court expanded this concept when it stated:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

In 1965, a constitutional "right of privacy" was created by the Supreme Court in *Griswold v. Connecticut*.[159] Although the right of privacy is not enumerated in the Constitution, the Court found a right in the "penumbras" formed by "emanations" of the various amendments of the Bill of Rights which create "zones of privacy."[160] Thus, the Court appears to have reasoned that because the right of privacy "emanates from specific fundamental rights, it too is 'fundamental,' its infringement is suspect and calls for strict scrutiny, and it can be justified only by a high level of public good."[161]

In *Carey v. Population Services International*,[162] the Supreme Court clearly articulated its holdings

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Id. at 399.

[158] *Id.*

[159] Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Stanley v. Georgia, 394 U.S. 557 (1969). The Court built on the result of *Griswold* when it held that Stanley could not be constitutionally convicted for processing in his home in obscene film for his own viewing. After noting the right to receive information and ideas is a fundamental right, the Court stated, "For also fundamental is the right to the free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564.

[160] *Id.* The "zones of privacy" mentioned by the Court are: The First Amendment protects the right of association. The Third Amendment protects a person's privacy of the home by prohibiting the quartering of soldiers. The Fourth Amendment protects a person's privacy by affirming the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment creates a zone of privacy in which "government may not force [a person] to surrender to his detriment." The Ninth Amendment protects privacy rights by providing: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

[161] Henkin, *supra* note 157, at 1421.

[162] Carey v. Population Services International, 431 U.S. 678, 684-85 (1977) (holding a state

regarding the right of privacy since *Griswold*. The Court noted that the right of privacy includes the "interest in independence in making certain kinds of important decisions."[163] The Court further noted that although the outer limits of personal privacy have not been defined by the Court, the personal decisions that an individual may make without unjustified government interference are decisions relating to marriage,[164] procreation,[165] contraception,[166] family relationships,[167] child rearing and education.[168]

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could not prohibit distribution of nonmedical contraceptives to adults except through licensed pharmacists, nor prohibit sales of such contraceptives to persons under 16 who did not have approval of a licensed physician).

[163] *Id.* (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

[164] *Id.* (citing Loving v. Virginia, 388 U.S. 1, 12 (1967). In *Loving*, the Court held a statute prohibiting interracial marriage was unconstitutional.

[165] *Id.* (citing Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535, 541-42 (1942)). In *Skinner*, the Court held unconstitutional a statute which authorized the sterilization of persons previously convicted and sentenced to imprisonment two or more times for felonies of "moral turpitude" in Oklahoma.

[166] *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)). In *Eisenstadt*, the Court overturned the conviction of a man for giving a contraceptive device to a young woman after a lecture on contraception. The Court stated, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis in original).

[167] *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). In *Prince*, the Court noted that it recognized the "private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.

[168] *Id.* (citing Roe v. Wade, 410 U.S. 113, 152 (1973)); *See also Meyer*, 262 U.S. at 399; Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In Roe v. Wade, the Court held a Texas statute forbidding abortion except to save the life of the mother was unconstitutional. The Court said that the statute violated the mother's fundamental right of privacy which was, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Roe*, 410 U.S. at 153. In

Although the Supreme Court has not defined the outer limits of personal privacy, those limits may extend to a prisoner on death row, where the prisoner's right of privacy prevails over the state's interest in allowing televised executions. Contrary to popular belief, the conviction of a crime and incarceration does not extinguish all of an inmate's rights to liberty.[169] In fact, prison inmates retain most of their fundamental constitutional rights and protections subject to the legitimate requirements of prison discipline and security.[170] As Chief Justice Burger stated in *Houchins v. KQED, Inc.*:[171] "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."[172] Thus, prisoners retain certain fundamental rights of privacy.

In addition, a condemned inmate in Louisiana has the added benefit of certain enumerated rights in the Louisiana Constitution. The Louisiana Supreme Court has noted that Article I of the 1974 Louisiana Constitution (Declaration of Rights) encompasses and enhances the protection of certain individual rights guaranteed by the United States Supreme Court's interpretation of the Fourteenth Amendment and Bill of Rights of the United States Constitution.[173] And, the court has stated that Louisiana's "state constitution's

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Pierce v. Society of Sisters, the Court invalidated a statute that required all children to attend public schools, because it deprived parents of their right to determine the education of their children and deprived private schools of their business and property.

[169] *Pell*, 417 U.S. at 822. *See also*, Vitek v. Jones, 445 U.S. 480, 493-94 (1980).

[170] *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 523 (1984) (holding "prisons are not beyond the reach of the Constitution"); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (noting several prisoner rights). *See also*, Bush v. Canary, 286 N.W.2d 536 (S.D. 1979); Matter of Sinka, 599 P.2d 1275 (Wash. 1979); Brown v. State, 573 P.2d 876 (Ariz. 1978); Moen v. Wilson, 536 P.2d 1129 (Colo. 1975).

[171] Houchins v. KQED, Inc., 438 U.S. 1 (1978).

[172] *Id.* at 5 n.2.

[173] *Perry*, 610 So. 2d at 755. *See* State v. Church, 538 So. 2d 993 (La. 1989); State v. Hernandez, 410 So. 2d 1381 (La. 1982); State v. Breaux, 329 So. 2d 696 (La. 1976).

declaration of individual rights. . . represents[s] more specific. . . [and] broader protection of the individual"[174] and is "far broader and more definitely articulated than corresponding rights in the Federal Constitution."[175]

Further, Article I, Section 5 of the 1974 Louisiana Constitution (Right to Privacy) expressly guarantees that "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."[176] This right of privacy has been interpreted by the state supreme court to afford more protection of individual liberty than the Fourth Amendment of the United States Constitution.[177] Accordingly, the state supreme court has concluded that in view of Article I, Section 5, coupled with the safeguard of Article 1, Section 2 (Declaration of the Right of Due Process of Law), the "generally accepted principles regarding prisoners' retention of fundamental rights despite incarceration have been adopted by [the Louisiana] state constitution."[178]

Application of Louisiana's Compelling State Interest Test

Although the right of privacy is not absolute, the Louisiana Supreme Court in *State v. Perry* stated, "[W]here a decision as fundamental as those included within the right of personal privacy is involved, state action imposing a burden on it may be justified only by a compelling state interest, and the state action must be narrowly confined so as to further only that compelling interest."[179] Thus, if

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[174] *Id.* (quoting Guidry v. Roberts, 355 So. 2d 438, 448 (La. 1976) (Tate, J.))

[175] *Id.* (quoting Guidry, 335 So. 2d at 452 (Summers, J. dissenting)).

[176] La. Const. art. I, § 5.

[177] *Perry*, 610 So. 2d at 756. See *Church*, 538 So. 2d at 996 (quoting *Hernandez*, 410 So. 2d at 1385) (Article I, Section 5, of the 1974 Louisiana Constitution "represents a conscious choice by the citizens of Louisiana to give a 'higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.'").

[178] *Perry*, 610 So. 2d at 757.

[179] State v. Perry, 610 So. 2d at 760 (citing Hondroulis v. Schuhmacher, 553 So. 2d 398, 415

Louisiana passes a statute giving broadcasters the right to televise an execution, it is possible that the supreme court will find a prisoner's countervailing right of privacy may only be overcome by a statute that is narrowly tailored to serve a compelling state interest.[180]

It should be noted the court in *Perry* found that the Louisiana Constitution's explicit guarantee of "privacy" in Section 5 was broad enough to avoid the United States Supreme Court's special rule for prison inmate cases, which had been applied in *Turner v. Safley*.[181] In *Turner*, the Supreme Court concluded that prison regulations restricting the fundamental rights of prison inmates should be upheld so long as the regulation was reasonably related to a legitimate penological interest.[182] However, the *Perry* court's failure to address the special rule from *Turner* was not inappropriate. Requiring state courts strictly to adhere to federal interpretations of cognate provisions prevent the courts from performing their traditional function of adapting their state's constitution to changing circumstances over time.[183]

Under the test in *Perry* the state's interest in allowing executions to be televised would most likely be insufficiently compelling and not narrowly tailored enough. The most likely interests the state would have in allowing executions to be televised would be informing the public and deterring crime. First, televising an execution may not inform the public in a narrowly tailored manner. The state would likely argue that televising an execution is for the benefit of its citizens because it will be informational and educational. In addition, with a potential audience that spends a significant number of waking hours

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(La. 1989).

[180] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973)). *See also* NAACP v. Button, 371 U.S. 415, 438 (1963) (holding a compelling interest is necessary to overcome a First Amendment Freedom)).

[181] Turner v. Safley, 482 U.S. 78 (1987).

[182] *Id.* at 89; *See infra.* pp. 34-37.

[183] *See generally*, John Devlin, State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Source, 3 Emerging Issues St. Const. L. 195, 226-45 (1990).

viewing television,[184] it is reasonable the media will seriously consider televising an execution when the policy handed down by the Federal Radio Commission since 1927 has been to serve the "public interest, convenience, or necessity."[185] Further, television is a social force in the United States that should not be underestimated. In 1995, more than 98% of all homes in the United States had at least one working television set.[186] Thus, it is understandable that television is an attractive means for the state to inform the public.

However, television is not a narrowly tailored means of furthering the state's interest of informing the public. The media is able to inform the public about the details of executions with the use of print media or with verbal communication via broadcast media. Justice Brennan's dissenting opinion on a Court order denying certiorari to *Glass v. Louisiana* [187] provides an excellent example of the ability to describe the details of an execution without the use of television:

> The force of the electric current is so powerful that the prisoner's eyeballs sometimes pop out and rest on his cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. . . Witnesses hear a loud and sustained sound like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber. . . The buying frequently is badly burned and disfigured.[188]

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[184] NIELSON TELEVISION INFORMATION, NIELSON MEDIA RESEARCH (Summer 1995). Nielson Media Research studies show the average television viewing time for a household is 6 hours and 59 minutes per day.

[185] Act of Feb. 23, 1927, Pub. L. No. 69-632, ch. 169, § 12, 44 Stat. 1162, 1167, repealed by Communications Act of 1934, Pub. L. No. 98-549, 98 Stat. 2779 (current version codified at 47 U.S.C. §§ 521-611 (1988)).

[186] NIELSON TELEVISION INFORMATION, *supra* note 184; *See also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995 (115th edition, 1995) (showing 98.3% of households in the United States had at least one televison in 1994).

[187] Glass v. Louisiana, 471 U.S. 1080 (1985).

[188] *Id.* at 1087-88 (Brennan, J., dissenting) (citations and footnotes omitted).

As noted in *Garrett*, allowing the media to televise executions may not appreciably increase the effectiveness of the media's reporting.[189] Thus, televising executions may not be a narrowly tailored means of furthering the state's interest of informing the public, and it may unnecessarily infringe upon a prisoner's fundamental right of privacy.

Second, the evidence of the death penalty's deterrent effect is inconclusive.[190] In 1977, before the death penalty was re-introduced, the homicide rate in the United States was 8.8 per 100,000 of the population.[191] After the death penalty was reintroduced in 1977, the homicide rate rose to over 10 per 100,000 in 1980.[192] In 1986, the homicide rate stabilized at 8.6 per 100,000, which was approximately the same as in 1977.[193] The Nation Research Council, a branch of the National Academy of Sciences, conducted a study which showed the murder rate increased in the United States from 1986 to 1992.[194] In 1992, the homicide rate was 9.8 per 100,000 people, which was approximately the same rate as in 1980.[195] Further, after Canada abolished its death penalty, the homicide rate in Canada dropped for ten years.[196]

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[189] *Garrett*, 556 F.2d at 1278.

[190] *See, e.g.*, Bowers; Royal Comm'n on Capital Punishment, Report (1953); Thornstein Sellin, A Report for the Model Penal Code Project of the American Law Institute (1959); David C. Baldus & James W. L. Cole, *A Comparison of Thornstein Sellin and Isaac Erhlic on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170 (1975); James Alan Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 Loy. L.A. L. Rev. 29 (1989); Richard Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 Crime & Delinq. 88 (1983); Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 Hamline J. Pub. L. & Pol'y 163 (1993); Hans Zeizel, *The Deterrent Effect of the Death Penalty; Facts and Faiths*, 1976 Sup. Ct. Rev. 317. *Contra* Walter Berns, For Capital Punishment: Crime and the Morality of the Death Penalty 83-152 (1991); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: Crime and the Morality of the Death Penalty*, 65 Am. Econ. Rev. 397 (1975); Stephen Layson, *Homicide and Deterrence: A Reexamination of the United States Times-Series Evidence*, 52 S. Econ. J. 68 (1985).

[191] Rosen & Journey, *supra* note 190, at 175-76 (citing Questions and Answers on the Death Penalty, Amnesty International, A.I. Index: Act 50/06/91.

[192] *Id.* at 176.

However, in *Gregg v. Georgia*,[197] the United States Supreme Court stated:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.[198]

As noted by Prejean in *Dead Man Walking*, in the fall of 1987, Louisiana executed eight people in an eight-and-a-half-week period during which there was a 16.39 percent increase in the homicide rate in New Orleans.[199] In addition, Prejean notes that only two weeks after Elmo Patrick Sonnier's well-publicized execution in 1984, there was a murder committed in Hammond, Louisiana, which was carried out in a similar manner to the murder Sonnier committed.[200]

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[193] *Id.*

[194] *Id.* (citing Cal Millar, *Guns Blamed as Murders Zoom*, Toronto Star, Oct. 10, 1992.

[195] *Id.*

[196] Amnesty International USA, When the State Kills. . . The Death Penalty: A Human Rights Issue 11-12 (1989).

[197] Gregg v. Georgia, 428 U.S. 153, 186 (1976).

[198] *Id.*

[199] Walt Philbin, *Major Crime Declines in New Orleans*, Times-Picayune, Nov. 7, 1987; Prejean, *supra* note 3, at 110. Prejean clarifies that "despite the general decline in crime, the murder rate in New Orleans increased 16.3 percent in the third quarter, the time period Immediately after the spate of execution." Prejean, *supra* note 3, at 256 n.8.

Although the public was aware of the executions described above, the executions were not televised. Would crime be deterred if the public were able to view executions? Probably not. Because executions have never been televised, the history of public executions in the United States is the best indicator of what might result. For example, on August 24, 1827, Jesse Strang was hanged in Albany, New York.[201] After the event, a spectator named Levi Kelley return home and told his friends and neighbors he did not believe that anyone who had witnessed a hanging could ever commit a capital crime. Only ten days later, Kelley murdered one of his tenants for defending a lame boy who had incurred Kelley's wrath.[202]

On October 8, 1875, a black man named George Speed was hanged in Fayetteville, Georgia, for raping a fifteen-year-old white girl.[203] On October 12, his half brother, Clarke Edmondson, who had viewed the execution, raped a white woman.[204] On October 17, Edmondson was taken from the jail by a mob and was lynched.[205]

In June 1880, Mack Hendricks was hanged in Madison County, Georgia.[206] Many parents took their children to witness the execution believing that it would have a beneficial effect.[207] The following month, some of the children who witnessed the execution decided to have one of their own. The children pinioned one of their playmates in the proper fashion, tied a wire around his neck and "hauled him in the air over the limb of a tree."[208] Luckily, the children cut the victim of the mock execution down before he was dead.[209]

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[200] Prejean, *supra* note 3, at 109-10.

[201] M. Watt Espy, Jr., *Capital Punishment and Deterrence: What the Statistics Cannot Show*, Crime & Delinq., Oct. 1980, at 537-544 (citing Negley K. Teeters & Jack H. Hedblom, Hang by the Neck 40, 42, 319-20 (1973)).

[202] *Id.*

[203] *Id.* (citing The Constitutionalist, Augusta, Ga., Oct. 9, 14, 19 (1875)).

[204] *Id.*

[205] *Id.*

[206] *Id.* (citing Nat'l Police Gazette, N.Y., May 24, 1879).

[207] *Id.*

Thus, under the "reasonable relationship" test used in *Perry*, neither the state's interest in informing the public nor in deterring crime may be satisfactory grounds to overcome a prisoner's countervailing right of privacy. The public may be informed without resorting to televising the event. The press can convey to the public the information it needs to know via print media and verbal communication via television. Further, because the evidence regarding the deterrent effect of executions is tenuous at best, there is no reason a prisoner's fundamental right of privacy should be invaded.

Application of the Federal Court's Reasonable Relation Test

As mentioned above, the United States Supreme Court in *Turner v. Safley* concluded that prison regulations restricting the fundamental rights of prison inmates should be upheld as long as the regulation was reasonably related to a legitimate penological interest.[210] The Court enumerated four factors that should be used in determining the reasonableness of the regulation at issue.[211] The four factors illustrate the deference the United States Supreme Court owes to the state legislatures under the principles of federalism.

The first factor is a "valid, rational connection" between the state's penological interest and the regulation created to protect that interest must exist.[212] The regulation will not be sustained where "[T]he logical connection between the regulation and asserted goal is so remote as to render the policy arbitrary or irrational."[213] Further, the state's objective must be legitimate and neutral.[214]

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[208] *Id.*

[209] *Id.*

[210] *Turner*, 482 U.S. at 89.

[211] *Id.* at 89-91.

[212] *Id.* at 89 (citing Block v. Rutherford, 468 U.S. 576, 586 (1984)).

Under the first factor the state may argue a "valid, rational connection" exists between a prison regulation allowing televising of executions and the legitimate governmental interests of informing the public. The state may argue it has a responsibility to inform its citizens about the conduct of those acting as its citizens' servants. Public access would assure the death penalty is administered in a manner that is neither cruel nor unusual. In addition, access to executions would provide citizens with the information necessary to participate intelligently in the discussion of the death penalty's validity.

As noted by the author Hugo Adam Bedau, "The relative privacy of executions nowadays. . . means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal."[215] Because more than 98% of all homes in the United States have at least one working television set, televising executions may be the best way to inform the public.[216] Further, this argument is supported by the Supreme Court's reasoning in *Gregg v. Georgia.*[217] In *Gregg,* the Court noted the legitimacy of the death penalty must be based on the "evolving standards of decency" within society. Therefore, if the "evolving standards of decency" are to be an accurate reflection of societal attitudes about the death penalty, the flow of information upon which society bases these standards must not be frustrated.

The counterargument is that people can learn just as much about the death penalty by the written and verbal accounts of the few witnesses who are present at the execution. There is no need to invade the prisoner's privacy by televising the execution to the public at large. However, the *Turner* test only requires there be a "valid, rational connection" between the regulation and the state's interest. Under this test the first factor would probably be satisfied.

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[213] *Id.* at 89-90.

[214] *Id.* at 90.

[215] HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 14 (3d ed. 1982).

[216] NIELSON TELEVISION INFORMATION, *supra* note 184; *See also* U.S. BUREAU OF THE CENSUS, *supra* note 186.

[217] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

The second factor is whether alternative means exist for the prisoner to exercise the right in question.[218] If other means exist, courts should be aware of the "measure of judicial deference owed to corrections officials. . . in gauging the validity of the regulation."[219]

Under the second factor, there are "other avenues" available for the exercise of the asserted right. As noted above, informing society can be accomplished using written and verbal communication. However, as the Supreme Court stated, deference should be given to corrections officials. Thus, the courts would most likely find the second factor to weigh heavily in favor of the state's statute.

The third factor is the impact accommodating the asserted constitutional right would have on guards and other inmates. As the Court noted, in the "closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order."[220] Therefore, the courts are to be "particularly deferential to the informed discretion of corrections officials."[221]

Under the third factor, corrections officials may argue that unlike the officials in *KQED, Inc.*,[222] they do not believe there would be any additional privacy or security problems if an execution is televised. Any physical harm that may be posed by a camera being thrown by an upset witness can be countered by bolting the cameras in place. Official witnesses and officers who may be captured on film can be electronically masked. The fact prisoners may riot or retaliate against someone can be countered by blacking-out the television broadcasts that may show the execution. Further, prisoners would most likely know an execution is taking place. If they intend to riot they will do so regardless of whether the execution is televised. In addition, prison officials can take extra security precautions before and during the execution. Thus, with the deference that the courts might give to prison officials, the third factor would probably not pose an obstacle to televising executions.

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[218] *Turner*, 428 U.S. at 90.

[219] *Id.* (quoting Pell, 417 U.S. at 827).

[220] *Id.*

[221] *Id.*

[222] *See supra* pp. 18-20.

The fourth factor is the absence of ready alternatives, which may be viewed as evidence of the reasonableness of a prison regulation.[223] However, this does not mean that this is a "'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[224] But, if there is an alternative that fully accommodates the prisoner's rights with minimal cost to valid penological interests, a court may consider that as evidence of a failure to meet the reasonable relationship standard.[225]

Under the fourth factor, a prisoner may argue the alternatives of written and verbal communication are sufficient evidence that a statute allowing televising executions is unreasonable. However, the state could argue that although alternatives to televising executions may be considered evidence of a failure to meet the "reasonable relationship" test, they do not conclusively determine reasonableness. In addition, there is no way of knowing whether the alternatives are with minimal cost to valid penological interests. Because executions have never been televised, it is impossible to know whether doing so would significantly deter crime or increase the knowledge of the public. As the Court stated, this is not a "least restrictive test," and prison officials do not have to set up and knock down all alternatives. Thus, the fourth factor probably would be overcome by the state.

Therefore, if the *Turner* test is applied by the courts, deference would most likely be given to the state's statute allowing televising executions over a prisoner's right to privacy. The test requires only a reasonable relation between the statute and its penological interests, which probably would not be difficult for the state to demonstrate.

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[223] *Id.*

[224] *Id.* at 90-91.

[225] *Id.* at 91.

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Conclusion

If a state were to pass a statute allowing executions to be televised, the success of the arguement for a prisoner's countervailing right to privacy would depend on whether the case were argued under state or federal constitutional law. If the case were argued under state constitutional law, and the state had expanded the right of privacy beyond that which is protected by the United States Constitution, the prisoner's right may prevail over the state's interest. Despite Sister Helen Prejean's desire to make executions public as noted in *Dead Man Walking*, under the Louisiana State Constitution, which expressly grants individuals a right to privacy, and the court's use of a compelling interest standard, a prisoner's countervailing right to privacy would most likely prevail over the state's interest in informing the public and deterring crime.

Under federal constitutional law, or state law, unlike Louisiana's, one which does not enhance fundamental rights, the courts would probably apply a reasonable relation test utilizing the four factors in *Turner*, which give significant deference to states' legislation concerning penological interests. Under this test a prisoner's right to privacy would most likely be outweighed by the state's interest in informing the public and deterring crime. At that point journalists would have to decide whether televising executions is ethically permissible, and not just legally permissible.

A Policy Analysis of the Telecommunications Act of 1996

by

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Abstract

This paper discusses various policy stances which underly the Telecommunications Act of 1996, along with a review of some of the policy and competitive impacts of the new law on the changing telecommunications markets. Normative, nomological and "unintended consequences" are the basic policy frames of reference used in the paper.

In addition, the paper looks at the supportive legislative rationalia found in current speeches of FCC commissioners, and in the joint conference report of members of the U.S. Congress as they voted on the new legislation. Their statements supply some insights into the mindset behind the law.

Finally, the paper examines at some of the practical impacts of the new law, as well as some of the players in the new arena. Among them are the major long distance companies, the Regional Bell Operating Companies and the major cable TV operators in the U.S.

The authors intend the paper to give some preliminary insights into the new law and its possible rationales. To that end, there is included is a lengthy policy and substantive provision synopsis of the major provisions of the Act, describing the intended meaning of the provisions. This is an appendix designed to provide a basic understanding of the Act.

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A Policy Analysis of the Telecommunications Act of 1996

Introduction: Impetus for Telecommunications Policy Reform.

For several years, there has been much talk about what changes might occur to the U.S. telecommunications infrastructure from combining the entertainment and information delivery systems of the mass media with the interactive capabilities of the telephone or video phone, and adding the capacity, storage memory and productive power of interconnected computerized work-stations, as well as the time and distance annihilating capabilities of digital telecommunications. (IITF, Sept. 15, 1993) Much has been posited about the positive aspects if these technologies were to converge into a national and global telecommunications infrastructure.

It has been said that today's Internet, which currently links some 35 million computer users around the world through email, news groups, and other primarily textual technologies is merely a precursor of such communication networks. Communications theorists have dreamed bright visions about building an "information superhighway" which would give future users of telecommunication networks access to unprecedented amounts of images, aural and textual information. Using such networks, users would have far greater opportunities to be distributors, as well as recipients of visual, aural, and textual expressions of their own making.

Telecommunication industry and government leaders and analysts have agreed that the current U.S. telecommunications regulatory framework, prior to the enactment of the Telecommunications Act of 1996, had changed little since the advent of television and presented obstacles to technological development. Several attempts had been made in the last 22 years to revise some or all of the Communications Act of 1934. Those efforts had met with varying degrees of success. [Ness, Susan (FCC Commissioner), "The New Telecommunications Marketplace: Radical Changes and Golden Opportunities", Speech-02/22/96, Public Policy Forum Series, Wharton School of the University of Pennsylvania, Philadelphia, PA.] That growing awareness prompted efforts by legislators in the last two sessions of the U.S. Congress to undertake activity dramatically to revise the 1934 Federal Communications Act, and to further deregulate the domestic telecommunication industries.

Legislators' efforts coalesced in 1995 in the form of two separate bills (S.652 and HR 1555) which were passed by the U.S. Senate and House of Representatives. From Fall, 1995 through the first five weeks of 1996, a Congressional conference committee spent long hours re-working the often disparate bills into a single piece of legislation. That final bill passed through both chambers of Congress on February 1, 1996. The voting in each house showed a majority in favor of passage. In the Senate, it was ayes 91 to 5; in the House, ayes 414 to 16. [Congress Votes to Reshape Communications Industry, Ending 4-Year Struggle, New York Times, 2/1/96 at p. 1.] However, political wrangling and contested changes to the legislation prior to its passage helped narrowly to avert a presidential veto, and a Senate partisan blockage, which had been threatened as late as November, 1995. Finally, on February 8, 1996 President Clinton signed the bill into law as the Telecommunications Act of 1996 (hereafter cited as the Telcom Act).

During the years of its evolution, this legislation has been the subject of intense scrutiny by multinational and regional telephones companies, cable and broadcast companies, wireless communications interests, print publishers, and companies engaged in the computer software and hardware sales. Consumer and special interest organizations representing a variety of political and social positions have also expressed differing views on the nuances of the legislation. In addition, academics and public interest groups have also analyzed the structural and cultural implications of the bills from a wealth of theoretical perspectives. Unfortunately, the general public has not shown particular interest in or awareness of the legislation (perhaps due in part to the bill's complexity and to a lack of media news coverage of the bills).

Experts believe that what may appear to the lay person to be purely technical and structural decisions about the development of the telecommunication infrastructure in the United States will influence how we live and conduct business in the digital age. They maintain that the development of increasingly complex technological networks, which must address a multitude of competing interests and serve individuals possessing a wide variety of skills and resources, presents unique opportunities for transforming society.

Proponents claim that the Telcom Act will create a more competitive and deregulated telecommunication policy and thereby accelerate private sector deployment of advanced telecommunications technologies and information services. The legislation dramatically redefines the duties of the 61 year old Federal Communications Commission (FCC) and allows for increased competition and convergence within the telephone, broadcast, cable, wireless communication, and online computer industries.

The plan of this paper is: 1-to review theoretical bases for policy-making; 2-to present the main aspects of the new law; 3-to discuss the policy approaches and apparent rationalia for the law; 4-draw plausible conclusions about the course of implementing the law; and 5-to summarize the Act in an appended, 11-page synopsis. This synopsis presents the highlights of the new law, including its universal service provisions, plans for public-educational-government (PEG) access to advanced telecommuni-cations services, interconnection regulations, standardization rules, the deregulation of media ownership, advanced television (ATV) spectrum usage, efforts to limit indecency on cable and interactive computer services, and efforts to block children's access to sexual and violent television and Internet materials. Still other points of contention, such as the movement to reform the copyright law, which are also closely associated with the development of digital technologies, are not addressed by the Telecommunications Act of 1996. Instead, copyright reform legislation has recently introduced in Congress as a separate measure.

The Theoretical Setting for Technologic Policy:

In order to understand the impact of the Telcom Act, its philosophy and the issues left pending, it is important to pose general intellectual frames for technologic policy-making.

It has been assumed that the position certain scholars take toward telecommunication reform often reflects their overall stance toward technology. In 1967, when Robert Heilbroner (1994) wrote his now famous essay on technological development, he believed that U.S. culture was in the midst of a transition from capitalist toward socialist principles. Hence, he saw the budding socialism of his day as a rudimentary constraint on high capitalism, which was marked by state-supported free-market industrial structures.

Thus, Heilbroner assumed socialism would continue to make inroads into the high-capitalist structures. He described himself as a soft technological determinist because he viewed technology as a mediating factor in social development, not necessarily the dominant factor.

Bruce Bimber (1994) describes three distinct stances taken toward technology: normative, nomological, and "unintended effects" model. According to Bimber, the normative stance looks to rules and standards as the key to proper technologic development. The nomologic view assumes that natural laws govern technologic development and suggests that the paths development may take can be predicted but not controlled. The unintended effects model assumes that it is impossible to predict or control the key social aspects of technological development.

NORMATIVE POLICY FRAME: Normative analysts believe that cultural and political decisions drive history, and that "technology is an important influence on history only where societies attach cultural and political meaning to it" (Bimber, 1994, p. 81). Analysts who believe that current policy making can be the key factor in shaping how advanced telecommunication and computer technologies will evolve rely on such normative understandings. Both Feenberg (1991) and Schaefer (1995) describe the current policy environment as the crucial factor in determining technological outcomes. They contend that once information infrastructure policy begins to be implemented on both a national and global scale, the opportunities presented by the new technologies will have either been seized or lost.

Path dependency marketing theories posit that once particular products, companies, and institutions have gained dominant positions within the society, it becomes progressively harder to dislodge them. These high-profile products, companies, and institutions become the "installed base" upon which other products must build. Whenever such market dominance is achieved, the likelihood of redesigning global communication technologies becomes increasingly remote. Therefore, Feenberg and Schaefer state that seemingly innocuous policy decisions made today are, in fact, critical to the long-term potential of such an unfolding technological system. As a result, the policy trends in the current Telecommunications Act of 1996, which comprehensively reforms telecommunications in the United States, takes on tremendous significance.

Within the Telcom Act, there two examples of provisions reflecting normative policy beliefs. The universal service mandate of the Act requires that all Americans must have somewhat equivalent access to telecommunication technologies. In addition, there are provisions for public access to PEG (public, government, and educational institutions) channels. Because they set aside channels or bandwidth for public uses, such technology policy provisions can have serious consequences on the interactive potential of the telecommunication system that eventually is deployed.

Reinhardt (1994) notes that the ratio of upstream to downstream bandwidths will ultimately bias the system toward either a consumption or fully interactive communication model. A system that has roughly equal upstream to downstream capacity provides all connected citizens with an equivalent opportunity to participate in fully interactive two-way communications. This type of system would be inherently less hierarchical and more egalitarian in its functioning than more asymmetrical systems. Although there is one passage calling for such symmetrical development in the 1996 Telecommunication Act, there are no specific mechanisms for ensuring that symmetrical capacity will occur in residences and public facilities. Clearly, omission of such symmetry could cause, from a normative standpoint, concerns about lost opportunities and insubstantial policy planning.

NOMOLOGIC POLICY FRAME: In contrast to normative understandings, Bimber describes the "nomological" stance as grounded in the belief that technological development is "based on laws of nature," and therefore can be predicted but not controlled (Bimber, 1994, p. 81). Bimber views Heilbroner as a nomological thinker because Heilbroner posited covering laws for technological development. Once the stage is set for technological development and diffusion, it matters little whether that development is embraced or rejected by society -- it will unfold of its own accord regardless.

To Heilbroner, as a nomologic thinker, technology usually develops along a well-defined frontier that shows continuous and simultaneous development. This view poses three ecological factors as necessary for technological development:

a. The accumulated stock of knowledge acts as a catalyst for technological capacity. This is why scientific advancement and technological development go hand in hand. Science and technology advance incrementally together. In industrial and post-industrial societies, science is pursued as a conscious activity supported by basic research.

b. The material competence of a culture restrains technological development. Heilbroner notes that Hero's steam engine designs were a curious and expensive plaything, but there was no accompanying technology to produce steam engines in practical numbers. Foundaries, milling machines, and other advanced production technologies had to exist to make functioning steam engines. The concept of nuclear power and nuclear weapons was born in Europe, but the accompanying technologies were first developed in the United States where a combination of advanced manufacturing units and massive resources were devoted to the task.

c. There also has to be a marketing structure and a division of labor to make the technological development useful and valuable. Mass production requires a society with mass markets. Before the development of capitalism, technology did develop and spread, but it lacked the furious pace and sudden diffusion shown in capitalist and even recent socialist societies.

One of the key ecological ingredients for technological development is the availability of a labor force with the skills and education level to create and use the technology. Heilbroner also noted that the labor force had to be located properly in cities to work on most industrial technologies. Within such nomological models, human free will becomes just another ecological ingredient -- one that may have some nuancing effect on the development and spread of technology, but free will is not the determinant of technological development.

The digital futures predicted by industrial visionaries like Bill Gates (1995) and Nicholas Negroponte (1995) are tied, not only to capitalism and highly trained suburban labor and consumer pools, but also to nomological understandings of the inevitability of technological development. While this type of thinking might be expected from industrial giants who have personally benefited from the diffusion of computer and telecommunication technologies, it is also far more prevalent than might otherwise be anticipated within our culture.

Such nomologic notions underpin the theories Esther Dyson, George Gilder, George Keyworth, and Alvin Toffler -- all of whom are key figures in the Progress and Freedom Foundation (PFF). The PFF is a think tank dedicated to "third wave" development that has been closely associated with the ideas and technology policies of Republican House Speaker Newt Gingrich. It (PFF, 1995) has offered a visionary set of principles for telecommunications and national information infrastructure development. The PFF thinkers maintain that unionization, bureaucratic organizations, and centralized governmental control are relics of the anachronistic second wave industrial order and have become obstacles in the path of progressive efforts to build a third wave postindustrial society. The PFF's "Magna Carta for the Knowledge Age" states: "....It is the government's efforts to apply its Second Wave modus operandi to the fast-moving, decentralized creatures of the Third Wave that is the real threat to progress." Indeed, if there is to be an "industrial policy for the knowledge age...", government should focus on removing barriers to competition and massively deregulating the fast-growing telecommunications and computing industries. (PFF, 1995)

This PFF view of government's true role embodies the traditional American distrust of government intervention in commerce. It asserts that private ownership should supersede public or governmental controls. In an era of intense global competition PFF thinkers maintain that only individuals and corporations unfettered by regulations will be nimble enough to be successful, and that only such unfettered private ventures will bring the full advantages of futuristic communication technologies to the average citizen. They posit that if Washington forces the phone companies and cable operators to develop supplementary and duplicative networks, most other advanced industrial countries will attain cyberspace democracy -- via an interactive multimedia "open platform" -- before America does, despite this nation's [current] technological dominance. (PFF, 1995)

The PFF's "Magna Carta" supports the takeover of local cable television service companies by the seven massive regional Bell operating phone companies (RBOCs) -- companies whose annual revenues of $84.2 billion in 1993 far outdistanced those of the three leading US long-distance phone companies ($60 billion), all broadcasters ($34.6 billion), cable companies ($22.02 billion), newspapers ($35.9 billion), wireless communication companies ($10 billion), information services companies ($13.6 billion), and hardware and software computer companies ($65.6 billion) (Congressional Quarterly, 1994).

However, even scholarly work calling for progressive regulation which may appear to be anything but supportive of PFF politics often contains similar strains of nomological and ecological determinism. In an edited volume on the policy strategies for the developing information infrastructure, William Drake (1995) and Jay Solomon (1995) describe the computer chip, acting in concert with telecommunication networks, as the dominant factor in the evolution of the new information age. They see the decentralization made possible by the computer chip as a force that can neither be controlled through policy nor through economic stagnation on the part of massive multinational telecommunications companies. The chip inside the individual user's computer has ushered in the "distributed network" model of today's Internet.

Drake and Solomon describe this decentralized network as the inevitable wave of future technological development. Thus, the ecology of the chip and the network will drive the wave forward toward a "demassified" and distributed model regardless of the policies adopted in Washington or Geneva. Yet, neither Drake nor Solomon entirely discount the importance of policy. At the very least they see it as a mechanism for either anticipating and embracing the inevitable technological development or becoming a victim of it. Therefore, both Drake and Solomon call for open architectures, interoperability, and standard setting to align the inquisitiveness and creativity of individuals and small entrepreneurs with inevitable growth of distributed networks. By doing this, policy makers can pave the way for a less traumatic and stable transition from current industrial structures toward a technologically advanced and progressive future.

Nomological analysts believe that open architecture design will produce a less expensive and more competitive telecommunication environment. Such systems are called "open" because a variety of designers and manufacturers can produce ancillary products for communication systems. This means that many companies will be able to provide add-on products and services at various stages of the message creating and transmitting process. A small equipment manufacturer would not have to produce and market a complete telecommunication product line, but instead could specialize in making and selling niche products that would be purchased to fill specific gaps in other companies' telecommunication systems.

Similarly, "interoperability" standards guarantee that there will be some mandated technical standards to which all equipment suppliers must adhere. The creation of interoperability standards should produce a more competitive and inexpensive infrastructure by enabling the products of one firm's network to connect with the networks built by other companies. This will create more opportunities for individual content creators and systems designers to distribute their work across networks.

Nomologists believe that open architecture and interoperability requirements in the 1996 Act will help prevent even the most well financed and vertically integrated telecommunication companies from reestablishing vertically-integrated monopolies that would suffocate innovation. Thus, nomologic thinkers do not believe that the Telcom Act will determine and shape the information age. But, they do believe that the Act's provisions may help determine who will benefit and who will suffer from the inevitable technologic changes.

3. **"UNINTENDED CONSEQUENCES" POLICY FRAME**: Finally, Bimber's "unintended consequences" frame endorses a policy model of constant improvisation by regulators who will need to react effectively to the unforeseen consequences of technological development. This reactive policy stance is also evident in the 1996 Act. Unlike models that rely on path dependency theories, unintended consequences models presume that changes must be made to adjust for unpredictable circumstances.

Perhaps as evidence of the prevalence of this model, it can be seen that the Telcom Act will, over the next five years, require the Federal Communications Commission to issue at least 9 reports on the evolution of Act-mandated telecommunications policy. The FCC will have to evaluate how effectively various policy objectives have been addressed by private industry during the first years of the Act's implementation.

But this is not the only new area that the FCC must address in the next few years. It must also oversee what should be a host of interconnection negotiations and contracts between local, regional, mobile, cable, and long distance service providers. It is also charged with setting up at least three separate funds for meeting PEG access and universal service objectives. In addition, the provisions of the Telcom Act require the FCC to conduct at least 80 rule-making proceedings on regulatory aspects left unfulfilled or not addressed by the Act itself.

Thus, within the next few years, the FCC is required to administer a number of new programs, carefully examine the details of hundreds of contracts between telecommunications companies, and lay out the foundation for universal service and public access for broadcast and computer-networked communication systems. The burden on the Agency will be enormous, and may by itself have a marked influence on the tenor, quality and immediacy of the policy-making it must undertake. Unfortunately, these new obligations are coming upon the FCC at a time when some members of Congress want dramatically to cut the Agency's budget. [Broadcasting & Cable, "White House Says Auctions Will Raise $32 Billion" March 25, 1996 at 19.]

This situation is disturbingly similar to the one that occurred when Congress passed the Communications Act of 1934. That legislation was to have dramatically rearranged the radio industry that had evolved after the passage of the Radio Act of 1927. But, Robert McChesney (1994) notes that underfunding by Congress made it impossible for the FCC to do what Congress had laid out for it in 1934. Without adequate resources, the Federal Communications Commission, newly created by the Communications Act of 1934, was forced to do little more than ratify the already existing radio structure. The lack of resources led to an inability to adapt to the dynamics of the radio industry. The failure to fund the FCC changed the nature of telecommunications policy and played into the hands of the existing dominant providers of radio programming and equipment.

To effectively fulfill its mission of adapting to changes brought about by new telecommunication laws, the FCC will likely need a budget increase rather than a cutback. Thus a major change in the political dynamic of FCC appropriations will be required if the failures of the past are not to be replayed on an even grander scale. Short-sightedness on the part of policy-makers and legislators about budgetary matters now may have dire unexpected consequences down the road as the impact of the Telcom Act on industry and consumer becomes clearer.

Summary: It can be seen then, that under any of the policy frames discussed above, that there are serious after-effects of any policy-making model which may defy definition and may elude proper and reasoned treatment. From a review of the new law, it can also be seen that the three theories have application to the apparent and covert reasoning for the laws content.

What Will Be the Policy Impact of the New Law on the Telecommunications Marketplace?

Predictions about the impact of the new law have been largely focused on the competition and consumer benefits likely to come from its de-regulatory stance. This section looks at the major provisions and contemplates the potential impact of the changes. It also attempts to assess the likely effects on the marketplace. Last, it looks at what was left undone by the Act.

1. Major Provisions of the Law.

The new law makes radical changes to the competitive circumstances of three major U.S. telecommunications industries, particularly telephone (local and long distance), cable TV and radio and television broadcasting. The stated objective of the Telcom Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition." [Conference Report, Telcom Act.] In addition, it addresses violence and indecency on TV and the Internet.

A. Telephone Provisions. Probably the most fundamental changes effected by the new law deal with telephone services and increased competition. The Act effectively repeals and subjects to its supervision the work begun by the 1984 break-up of the Bell/AT&T telephone system.

Now, within certain competitive parameters, the seven Regional Bell Operating Companies (hereafter "RBOC's") may expand beyond their provision of local exchange telephony into long distance services. And, long distance providers (A.T. & T., MCI and Sprint) can now enter the local exchange telephone business. Both arms of telephone business may enter new businesses: cable TV entertainment, on-line data services and equipment manufacture. But, the "competitive checklist" of precursor circumstances will require FCC and state/local rule-making in order to effectuate these competitive nuances.

A major requirement of the Act is that all local telcos must provide equal access to their local exchange networks for interconnection by other telecommunications carriers. This assumes the RBOC's will have to provide number portability (a customer taking a phone number with his or her service), dialing parity (being able to choose and interface with any carrier via access codes) and agreements for reselling of services .

The Act further requires that principles of "universal access" -- all services being available to all potential users at reasonable prices regardless of users location -- be defined and built into any policy and rules created pursuant to the act.

1. Long Distance Services: the new law allows RBOC's to enter into long-distance telephone services. However, this will be overseen by the FCC and allowed only upon their meeting of certain "competitive checklist" terms.

2. Electronic Publishing: the RBOC's are permitted to provide "news (including sports), entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; legal notices; scientific, educational, instructional, technical, professional, or public, trade or other literary materials; or other like or similar information." This provision will allow RBOC's to compete with the present on-line computer services and newspaper electronic offerings.

3. Video Programming: The Act lets telephone companies get into the provision of video programming by one of four means: **a-common carrier transmission** (pursuant to the existing requirements of the Communications Act of 1934); **b-cable system ownership**, subject to local and federal regulation as cable TV is now; **c-wireless or radio-based means**, such as using microwave or satellite channels for transmission to subscribers; and, **d-Open Video Systems ("OVS"):** this method replaces the "video-dialtone" regulations and permits telcos to create "cable-like" systems using their own phone lines. They can buy programming and lease channel space to others, but cannot discriminate or monopolize the OVS channels.

B. Cable TV: The rates for cable TV's expanded basic services (CNN, ESPN, but not pay services) will be deregulated, repealing the 1992 cable amendments to the 1934 Act. In small cable markets, this can happen immediately; in larger markets, it will not occur until 1999.

However, the major concession of the Act for cable TV is that cable operators may now enter the local and long distance telephone markets. This alone creates a whole new class of telephone competition, regardless of the re-entry of former AT & T players into local and long distance services.

C. Radio and Television Broadcasting: In broadcasting, the dominant theme was significantly to relax or eliminate national ownership caps. For TV, an ownership group may increase its total coverage of national TV homes from 25% to 35% (about 33 million total homes). Major networks may start but not purchase new networks.

Radio ownership of multiple stations in all size of markets is greatly increased. For example, in the largest radio markets having at least 45 stations, a group may own 8 radio stations; in the smaller markets (14 or fewer stations), 5 total stations may be owned by a single entity. The law's provisions attempt to prevent a single company from concentrating it station ownership in a given market by owning all the stations in either the AM or FM radio bands.

FCC rules on ownership of TV and radio in same markets (one-to-a-market rules) will be liberally interpreted. License renewals for both radio and TV have been made easier to handle. Unless the FCC has evidence of a licensee's violation of its major rules, licenses will be renewed, and for eight years (up from 5-7 years).

Issues regarding HDTV and V-chip regulation were addressed but dealt with in part. The law decides to implement the digital, HDTV standard for commercial broadcasting. And, a V-chip is required to be built into all new domestic TV sets. However, there is considerable dispute about the "spectrum flexibility" approach of the law. It loans, in effect, an additional new 6 Mhz channel to present licensees for digital/HDTV television experimentation. At the end of ten years, one of the two channels will be returned and the "re-packed" spectrum then auctioned off for other uses. Senators Dole, Pressler and Hollings had threatened to derail the bill's passage unless assured that the FCC would not issue digital licenses without hearings on spectrum fees. [Broadcasting and Cable, "Spectrum Auction Still Looms", Feb. 5, 1996, at 12.]

The V-chip provision presents some ambiguity. Voluntary ratings must be created by TV program executives to categorize programming based on its violent and sexual content. Yet, there is a question whether the ratings will ever be implemented, and this provision of the law is almost certain to cause lengthy litigation on constitutionality. [New York Times, "Telecommunications Bill Signed, And New Round of Battles Starts", Feb. 9, 1996 at C-1.]

D. Communications Decency Act of 1996: As part of the Telcom Act, Congress incorporated and expanded former proposed Senate Bill 314, which was also called the Communications Decency Act (hereafter "CDA"). The aim of the CDA is to protect the public from obscenity, indecency and harassment over "telecommunications devices" and networks. There are four major divisions of the CDA.

1. This law makes it unlawful to use telephones, computers and other "telecommunications devices" to annoy, harass or abuse another person under 18 years of age. This would include simple things like repetitive phone calls, but also covers using computer networks to prey upon children for sexual purposes.

2. It is unlawful to use an interactive computer service to send indecent, sexually explicit materials which meet the Miller v. California and Ginsberg v. New York tests of indecency as regards juvenile persons. The provision attacks pornography on computer services and networks like the Internet and Compu-Serve.

3. The Act's "good Samaritan" provision protects providers and users on interactive computer services who screen out indecent materials. If a service provider or user screens materials our, they cannot be civilly liable for actions taken to restrict access to such materials, regardless of whether their actions are considered to be constitutional or not.

4. Cable TV programmers must scramble programming considered unsuitable for children. TV broadcasters must rate and encode a rating on their broadcast programming for violent and sexual content. All new TV receivers manufactured, within two years of the Act, for sale in the U.S. will have a "V-chip" device built into the set. This device will read the broadcasters' ratings codes and enable parents and others to screen programming based on such ratings.

Summary: It can be seen that the major thrust of the Telcom Act is to de-regulate and de-throne the monopolies for telephone services and cable TV services. TV and radio broadcasting are given relaxed ownership standards and TV now faces the prospect of either purchasing or being "loaned" additional HDTV (digital) broadcast frequencies for use in developing digital TV uses and facilities. The indecency provisions of the CDA are important but somewhat secondary to the larger industry issues of competition and digital spectrum.

2. Possible Rationalia Embodied in the Telcom Act.

Usually, a new law has a comprehensive legislative history to support and assist in its analysis. And, there are often court decisions interpreting its provisions. In this case, the Telcom Act is so new that, at least for now, analysts will be left to piece together the rationale for the law from front page news stories, official's speeches and reports of conference debates.

From the speeches of FCC commissioners and the statements of Congress persons given either on the day or shortly after passage of the law, we can glean catch-phrases which may help elucidate the Act. It is fascinating to look for theoretical underpinnings in their statements. Clearly the policy-makers can be seen representing all three philosophies: normative, nomological and "unintended consequences".

A. Visions of Competition and Consumer Benefits.

- The bill was seen as a "grand celebration of the free market system"....a strategy "to unleash (technologic) geniuses...." It also unleashes "the spirit of competition in all forms of telecommunications." Rep. Tauzin (LA), Congressional Record, 02/01/96 at 1151.

- The law opened the "floodgates of competition", and with it deregulation will result in better technology, new applications, lower prices and more consumer choices of basic phone, cable and new digital broadcasting. Rep. Fields (TX) C.R. at 1149.

- The momentous achievement of enacting a new Telcom law after two years "turns the old law on its head. The new law doesn't assume that communications is a "natural monopoly.../but a communications marketplace [that] can be made more competitive". The law "unleashes...grand plans" for one-stop telephone service shopping among suppliers of long-distance and local phone and cable TV service. Hundt, R., Implementing the Telcom Act of 1996:Real Work Begins, Speech, 2/21/96, Newsweek Telecomm Forum.

- The revision of the law was likened to the momentous event of changing historical time-keeping from the Julian Calendar to the Gregorian Calendar...with the law intended to "end the era of big government in communications....to begin the era of genuine competition [affecting} every citizen of this country." Hundt, R., Speech: Questions and Consequences - How do we get the right answers?, 2-27-96, National Ass'n. of Regulatory Utility Commissioners.

B. Many see a new world of technology ushered in by the Telcom Act:

- "...We can not move into a computer age with laws...written for the radio age." Rep. Bonior, MI, C.R. at 1148.

- We are ushered into the dawn of an information age." Rep. Fields, C.R. at 1149.

- What will come on account of the new law is "greater than the PC revolution....bold new era of communications." Rep. Stearn, FL, C.R. at 1148.

- "I envision...a world of increased competition and reduced government regulation. In this brave new world, consumers will have choices galore for their communication needs. Every home, business, school, library, health care facility will have access to the multiple communications providers at reasonable prices. The paths that deliver communications services may be wired, wireless or perhaps both." Chong, R., A Camelot Moment - the Telecommunications Act of 1996, Speech 2-15-96, Federal Communications Bar Ass'n.

C. Glowing predictions of Global Leadership, More Jobs and Increased Revenues.

- This is a "jobs bill" created by innovation and competition. Rep. Klug, WI, C. R. at 1147.
- The law will "create jobs and make us more efficient in a changing global economy". Rep. Bonior, C.R. at 1149.
- American companies will dominate the global landscape in the filed of telecommunications. Rep. Fields, C.R. at 1149.
- The bill unleashes a "digital free-for-all". The net result of the law will be "tens and hundreds of thousands of jobs, far more than have ever existed in this economic sector. Every child in K-12 will gain skills to help him or her compete in a global economy. "So, we are all going digital. Life will never be the same". Rep. Markey, MA, C.R. at 1151.
- 1.5 million to 3.5 million new jobs will be created by the law, Rep. Tauzin, C.R. at 1151.
- The bill "unleashes $63 billion in economy activity". Rep Hastert-IL, C.R. at 1152.

D. Some spokespersons were very specific in their attention or in their criticisms.

- Rep. Goss-FL was concerned about the local government loss of control of rights of way and of the loss of diversity and localism, especially in smaller TV markets. C.R. at 1150
- Rep. Frank-MA said he disagreed vehemently with giving wealthy broadcasters free digital spectrum. C.R. at 1150.
- One representative feared the law seriously challenged the localism/diversity precedents of media because of the way the law favors media conglomerates. C.R. at 1146-47.
- Representative Pat Schroeder, CO and several other Congress women expressed displeasure with the hasty consideration of the bill and with what they felt would punish abortion information providers using the Internet.
- Rep. Fields argued that the V-chip requirement is unconstitutional. C.R. 1155-57.
- Rep. Markey tempered his glowing views of more jobs saying that the paradox was that

some would be lost first, and then others created by the activity engendered by the bill. C.R. at 1151.

- Rep. Burr- N.C. rebuked the FCC for its failure to treat the structural requirements assessed against the RBOC's equally for both radio cellular and PCS. C.R. at 115
- Rep. Conyers said that the Consumer Federation of America expressed unhappiness with the likely increase in phone and cable TV rates as big media take over. C.R. at 1157.
- Mr. Hyde, Ms Eshoo and Mr. Bouder all gave long speeches about telco structure, and provisions to keep the FCC from regulating the computer industry. C.R. 1157-61

Normative policy beliefs can be seen in the tendency to promote competition to the exclusion of looking at long term policy impacts on other considerations. This clearly reflects the classic norms of setting regulation or cutting it back so that entrenched interests can not predominate in the marketplace.

When members of Congress state their concerns about the future and nature of what has been unleased, as regards technology and competition, they are expressing fears with a nomologic cast to them. Many of them were willing to boast of the new competitive and consumer benefits which could occur. However, a number of them were unwilling to go very far in predicting or trying to dictate the actual outcome of the forces they had unleashed. A few were candid to say that job and market dislocations could in fact happen as the initial outcomes, rather than the wished for increase in revenues and employment. The hopeful wish that they will come to pass is a less than comforting policy stance.

And, the problem of adapting to unforeseen consequences becomes even more acute when it is considered in light of the difficulties associated with implementing new policies. The Communications Act of 1934 was obsolete decades before Congress and the president were able to achieve consensus for telecommunication reform. The fragile coalitions that led to the current legislation could be even more difficult to rejuvenate in the wake of the legislation.

Indeed, if market leaders achieve dominant provider status and begin to flaunt the competitive and open intentions of the law they may quickly prove powerful enough to prevent adaptive policy decisions. If that happens then the bright visions of telecommunications that spawned the current wave of reform will reflect the folly of lost opportunity, more so than they illuminate a brighter future.

3. Possible Impacts of the Telcom Act

In his book, “Old Media/New Media: Mass Communications in the Information Age”, Wilson Dizard, Jr. notes:

> “America is the country which is inventing the future (quoting French sociologist, Michel Crozier)....[His] observation applies with particular force to...old media and new media....Most of the new technologies...setting the pace for global media changes (are American)...nurtured by a political and social environment that encourages them. [Dizard, 57]

Dizard feels it is essential to look at these political and cultural factors influencing media patterns of development. He finds the last decade of telephone diversification as the pivotal factor:

> The event that had the most influence in stimulating new media development in the past dozen years....was the lifting of the regulatory restraints on the U.S. telephone industry culminating in the 1984 breakup of the A.T. & T. monopoly. The competitive telecommunications structure that emerged since then has given the media industry a powerful incentive to develop new electronic services and modify older ones. This shift is in its early stages; the coming decade will see it full flowing with more far-reaching changes than in any other period of the U.S. mass media. [Dizard, 57]

If Dizard is right, then the current, further de-regulation of the telephone companies, both long distance and local exchange services, will provide a monumental shove in the same and in other directions. The pro-competitive, market-based stance of the Telcom Act, notwithstanding the retention of broadcast and indecency regulations, may be the impetus precisely needed to push the convergence of more media. It may usher in the rising of new and varied forms as well.

Among the possible players in a new telecommunications media world are the large, wealthy long distance providers, the equally large and wealthy local telco providers, the smaller cable TV entrepreneurs with entertainment marketing facilities and capacious residential networks, and the ambitious computer industry segments.

Many attempts at creating convergence and new alliances have already been fostered in the uncertain regulatory interim preceding the passage of the new law. Observers feel that the A.T. & T -McCaw Cellular merger, MCI and British Telecom marriage, Atlantic Bell-TCI (though ill-fated) deal, the Disney-ABC merger, the Time-Warner and Turner discussions, the US West and Continental Cablevision merger are all evidence of things to come now that the Telcom Act is law. [Business Week, "The Coming Telescramble", April 8, 1996, at 64-66.]

Some analyst feel that the long distance telcos, ATT, Sprint and MCI are the most well-placed to capitalize on the newly opened markets because they possess the "best marketing skills, the strongest brands, the deepest pockets and familiarity with competition." Their apparent weakness among the panoply of players seems to be their reliance on other telcos for the ability to interconnect to consumers' homes. [Business Week, "The Giants Aren't Sleeping" , at 70-72.]

Looking at the position of local telcos in the competitive mix, analysts see them as financially strong and pretty fair competitors. It seems, however, that LEC's (RBOC's) suffer from the lack of a high capacity, speedy digital network, the kind that the long distance companies already have. But, one of their greatest strengths is that they already do serve residences directly and as an industry group, they are comfortably profitable. [Business Week, "Think Local-And Invade", at 68-69.]

Market analysts see cable TV operators as decent competitors in the new arena. They have plenty of capacity in their cable network and the beginnings of light fiber connections to 60 percent of America's TV homes. In addition, they seem to have great experience in selling entertainment services to subscribers. However, on the negative side, experts say that the cable TV network is localized, lacks digital switching, suffers from poor service complaints and is heavily burdened by debt. [Business Week, "I-way or No Way of Cable", at 75-78.]

Probably the most cogent guess about the shape of the future is that the converging conglomerates will be led, initially, by the long distance giants, followed closely by the RBOC's. Cable TV will be a respected competitor, but because of its smaller financial strength and size will have to find well-heeled partners to make their future come to pass. [Id, at 66-68.]

If the history of building the railroad network in this country is any indicator, then many of those companies which start out to build the converged Information Superhighway will not be among those which ultimately cross the finish line. But, it is still far too early to count any of the competition out of the race.

4. The Impact of Things Left Undone.

In the near term, it may be the FCC which is the determining factor in this new game. To it has fallen the immense burden of fleshing out the regulatory skeleton created by the Telcom

Act. It has before it at least 80 rule-makings, 9 special reports and the forming of several advisory boards to implement or track the goals and outcomes of the legislation. [See, Broadcasting and Cable, "FCC begins work on telcom act", February 19, 1996, 14-15.]

Already the endless line of special interests has formed at the doors of the FCC. Lobbyists, public interests, industry representatives and legislators are taking their toll of time and resources as they seek to influence the rules that will ultimately spell out the details. [Wall Street Journal, "FCC is Besieged as it rewrites rules in telcom", March 29, 1996, at 1.]

Not only the will the policy-making burden on the FCC, together with the inevitable and already-occurring litigation, take a heavy toll in terms of time and quality of decision-making, but another more fearsome, bureaucratic specter is forming. A number of groups, including legislators, are calling for the FCC to handle the rule-makings and then work itself into a much smaller agency. It would take an extremely altruistic FCC staff to not only rewrite telecommunications rules, but to also write and carry-out their own economic death sentences.

Conclusion.

The pressures for decent public policy-making in the face of increasing demands on the FCC may reap many unintended consequences. Normative philosophies will surely compete with others to shape the future. And, those who follow nomologic tendencies in policy will argue that the marketplace being created here, one of competition and conglomerates, will not behave as normativists would predict.

At any rate, the process of change in telecommunications policy is underway. Events and consequences are being pushed (or are driving matters) forward. A great deal of analysis and research needs to be done on the underlying rationalia and effects bringing the world of telecommunications to this point. In particular, it will need more study to determine whether the law creating new opportunities will bring to fruition the concomitant need...the consumers who understand, desire and will pay for the new services being developed. It is too early to tell whether the "killer apps" will come about at prices and with quality sufficient to tap into the discretionary dollars of American consumers. It could just as easily come out that the only competition is among a shrinking number of media behemoths, seeking to graze each others pastures and not creating new ones. It is also entirely possible that the bright visions of a dawning information age will ultimately be placed in the hands of a few, new "natural monopolists". The jury is certainly still out on a number of critically important matters affecting the rising of the digital future.

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Appendix: Annotated Synopsis of the Telecommunications Act of 1996

This Annotated Synopsis and Commentary is based on the Telecommunications Act of 1996 and the Conference Committee Comments. This work, or portions of this work, may be copied, reprinted, or redistributed provided the original authors are credited as its original authors.

The Telecommunications Act of 1996

(signed by President William Clinton on February 8, 1996)

The Telecommunications Act of 1996 (Act) amends the Communications Act of 1934 (47 U.S.C. 151 et. seq.).

Sec. 3. Definitions

The act defines an "affiliate" as an entity that has more than 10 percent of its equity directly or indirectly owned or controlled by another business.

The Act ensures for phone "number portability," which would enable a consumer to switch telephone service providers without changing the consumer's phone number.

Title I -- Telecommunication Services

Sec. 101

Part II -- Development of Competitive Markets

The Act calls for "interconnection" and "unbundled access" for phone companies and certain other telecommunication carriers. It also requires telecommunications companies to make their services available to people with disabilities.

Telecommunications local exchange carriers (LEC -- local phone companies) must permit other companies to resell their telecommunications services and connect with their networks and services, just as if the connecting company were a subsidiary of the LEC. This is also called "nondiscriminatory access." Upon request, an LEC must permit other companies to tie into individual services offered by the LEC. Such connections should be seamless and transparent to the user.

The entities involved in an interconnection request should engage in voluntary negotiations over pricing and technical procedures. However, the state telecommunications commission is responsible for overseeing any agreement and mediating in the interconnection process. If the state commission does not fulfill its duties, then the FCC or judicial review will step in to make the interconnection occur. At the request of one of the parties, a Federal District Court will review an interconnection agreement.

Each interconnection agreement will be made available to the public within 10 days after the agreement has been reached. Similar agreements and terms must then be offered to other entities, so that there is no price discrimination or technical barriers to prevent competition. States can impose universal service and quality standards so long as they are done in a "competitively neutral" manner. The FCC is charged with overturning agreements that are not competitively neutral.

Sec. 254. Universal Service

The FCC will immediately institute a Federal-State Joint Board to make recommendations on universal service requirements. Although this statute does not indicate the exact make-up of the board, the FCC has already ruled that the board will be composed of 8 members. The Act requires that one member of that board will be a "utility consumer advocate" to be nominated by a "national organization of State utility consumer advocates."

The Federal-State Joint Board's recommendations on universal service will include advanced information and telecommunication services, as well as traditional phone service. The Act calls for equivalent pricing for identical services in poor, rural, and urban areas, as well as across different states. All interstate service providers must on a nondiscriminatory basis make specific predictable contributions to achieve universal service goals. The FCC, in consultation with the Federal-State Joint Board, will periodically reset these requirements based upon the following four criteria: (1) Is the service essential to education, public health, or public safety? (2) Have the services been subscribed to by half of all residential customers in areas where it they are marketed? (3) Are public telecommunications networks deploying the service? (4) Is the service consistent with the "public interest, convenience, and necessity?"

Each state can make additional intrastate universal service requirements, as well as collect contributions for a state-universal service fund. However, those state activities must not interfere with interstate requirements.

Universal service funds will also be used to defray the costs of providing access to health care services in rural areas at rates comparable to those in urban areas. Nonprofit schools and libraries will be eligible to use educational services at subsidized rates below those charged to other parties. The level of subsidization or discount will be determined by the FCC for interstate transmission and by the states for interstate telecommunications. Public and nonprofit elementary and secondary schools, libraries, and health care providers will also have, whenever reasonable, subsidized access to "advanced services."

Sec. 257. Market Entry Barriers Proceeding.

Within 15 months the FCC will identify and eliminate regulations and statutes that act as market barriers to entrepreneurs and other small telecommunication and information businesses. From that point on, The FCC will conduct similar reviews every 3 years.

Sec. 151. Bell Operating Company Provisions.

The Act allows the regional local phone companies (RBOCs) to immediately enter the market for long distance telecommunications outside their regions. To provide long distance service within their regions --InterLATA services -- an RBOC must pass a competitive checklist. InterLATA services generally entail transmissions from one area code to the next within a RBOC's designated region. The checklist for InterLATA competition calls for open interconnection policies to be implemented, and necessitates application to the FCC and consultation with the Attorney General, as well as the appropriate state commissions. Determinations, including the written opinions of the Attorney General, will be issued in writing within 90 days of a request.

The following checklist is designed to prevent the spread of predatory and monopoly business practices by RBOCs, which have for over a decade been the dominant or monopoly phone service provider in their regions. The checklist stipulates that when it comes to creating a competitive environment within its primary region, the RBOC must be nondiscriminatory in terms of: pricing and usage of rights of way; interconnected service pricing; the unbundling of services; allowing competitors full access to 911 emergency services, directory assistance, operator assistance, white pages directory listings, telephone number assignment, and the signaling databases needed to complete a phone call; and engaging in reciprocal billing, compensation, and resale agreements with other phone companies.

A telecommunication company's request to serve a new area must also meet a "public interest, convenience, and necessity" (PICON) standard set by the FCC. But when denying a request on grounds that the RBOC does not allow competition within its own service area, only the above checklist can be used as criteria for determining that viable competition is not possible.

Sec. 272. Separate Affiliate; Safeguards

When interconnecting services, which are mutually owned, that were not permitted to interconnect prior to passage of the Act, the mutually owned interconnecting services must use separate affiliates, or subsidiaries, that operate independently. To ensure independent operation the affiliates must: keep separate books; have separate offices, directors, and employees; record all transactions in writing and make them available for public inspection. The mutually owned companies also must: not provide collateral for each other's loans; refrain from discriminating when offering services to unaffiliated companies; and obtain at their own expense biennial state-government audits that demonstrate the separate nature of their business dealings.

The Act allows Bell Operating Companies (RBOCs) to begin manufacturing telecommunications equipment for networks and residences. The manufacturing must also be carried out by separate affiliates without any cross-subsidization of the manufacturing unit by the RBOC.

There are sunset dates when the separate affiliate provisions will no longer apply. They will cease to be in effect for equipment manufacture exactly three years after the FCC authorizes a Bell Operating Company to begin manufacturing equipment. Unless the FCC rules otherwise in the interim, the offering of within-region non-local service (InterLATA) by a RBOC will no longer require separate affiliation after February 8, 2000.

Sec. 273. Manufacturing by Bell Operating Companies

As has previously been noted, RBOCs can begin manufacturing telephone equipment. In the process, they and other leading telecommunications manufacturing entities will help set the equipment standards that smaller telecommunications companies will necessarily have to follow. Setting those standards so that large and small companies have a relatively equal opportunity to create products and services that will function with other companies' equipment, is a concept popularly known as "open architecture."

The Act has several open architecture provisions. It indicates that any standard setting persons or entities within an affiliate must publish and share standards industry-wide, as well sharing as any changes in standards that are being considered with other companies doing business in that area. Furthermore, persons or entities responsible for setting standards may not engage in sales or marketing with affiliated subsidiaries.

These provisions apply to affiliates in which 10 percent ownership exists, as well as those companies that own 5 percent of the voting equity of Bell Communications Research Inc. (Bellcore).

Sec. 274. Electronic Publishing by Bell Operating Companies

The Act defines "electronic publishing" as the dissemination and sale of content, including sports, entertainment, financial, educational, legal, public records, archival, and other types of information that may be transmitted as written text, images, or sounds. Electronic publishing does not include call messaging, data translations, and other such phone services.

Bell Operating Companies are permitted to engage in electronic publishing provided that service is offered through a separate affiliate or electronic publishing joint venture. With regard to a RBOC, their affiliates and joint ventures performing electronic publishing must: keep separate books; have separate offices, directors, and employees; record all RBOC-affiliate transactions and contracts with the FCC and make them available for public inspection; value property and assets separately from the parent company and value any transfers in accordance with appropriate FCC and state commission regulations; avoid providing collateral for each other's loans; refrain from discriminating when offering services to nonaffiliated companies; not share trademarks or common marketing identifications with the RBOC or engage in any mutual promotions or marketing; and produce at their own expense annual performance reviews to be filed with the FCC and made available to the public.

If the electronic publisher is involved as a joint venture with a RBOC, the RBOC can engage in limited promotion and marketing, provided the RBOC owns less than a 50 percent of the joint venture and has claim to less than 50 percent of the electronic publisher's gross revenues.

Sec. 275. Alarm Monitoring Services

Bell operating companies can not start alarm monitoring services for five years from the time the Act became law. If a company had an alarm monitoring service prior to November 30, 1995, it can continue to run it as a separate subsidiary without any form of cross-subsidization or protection from the RBOC.

Sec. 276. Provision of Payphone Service

Payphone services must also be handled as separate subsidiaries. This is designed to encourage companies that are not Bell operating companies to enter the market.

Title II -- Broadcast Services

Sec. 201. Broadcast Spectrum Flexibility

Prior to passage of the Bill, there was considerable debate as to whether existing broadcast licensees would be given a new frequency allocation for each channel that broadcasters presently used for free commercial programming. All U.S. television broadcasters now utilize NTSC signals, which have been the U.S. standard since the 1940s. An earlier legislative proposal would have effectively doubled the amount of spectrum that each broadcaster now has by giving broadcasters another channel allocation for each commercial allocation they now have. The additional spectrum was to have been used to change over to a higher resolution HDTV broadcast standard.

For a period of five or ten years, broadcasters would be required to transmit their programming over two different channels, one using the old NTSC signal and the other having a digital HDTV signal. The HDTV channel would have far higher quality stereo audio, approximately twice the image resolution, and be slightly more horizontally elongated (1.77 for HDTV versus 1.33 for NTSC horizontal to vertical ratio) than the current NTSC broadcast system. Once the changeover had been made from the current NTSC analog system to the new digital HDTV system, the broadcasters were expected give up their old frequencies and retain only a single HDTV channel.

This plan underwent several revisions in the two years prior to the bill's passage. Broadcasters lobbied hard to keep both the old spectrum and the new HDTV channel spectrum even after the old NTSC broadcast standard had been phased out. That plan would have effectively doubled the telecommunication capacity of broadcasters, who would have been free to use the old frequency to provide another broadcast channel or to market a variety of new wireless services. The buzzwords that came to be attached to this proposal was "spectrum flexibility." Broadcasters would have had the option to either double their programming capacity or offer a host of new services while upgrading their current broadcast channels to the new HDTV standard.

The double channel proposal, which would have represented a spectrum giveaway to broadcasters, soon came under fire from people who were disenchanted with the public-interest quality of commercial television, as well as from existing non-broadcast wireless service operators. They questioned why spectrum was simply given to broadcasters, either for distributing broadcast programming or for offering new wireless services, when PCS users had to pay billions for their spectrum allocations in recent public auctions. Estimates of the auction value of the proposed HDTV broadcast spectrum ran as high as $70 billion -- money which fiscal conservatives realized would help balance the Federal budget.

In the weeks prior to the bill's passage, Senator Majority Leader Robert Dole (R-KA) came to be the leading proponent of a spectrum auction for new broadcast frequencies. Months earlier Dole had delivered a stinging criticism of the values of Hollywood programming. The presidential contender had also adopted a strategy of taking a public stance against "corporate welfare" (Mills, 1996). Auctioning public spectrum to broadcasters for what had come to be called "advanced television services" fit well with both of Dole's policy themes. Finally, Mills notes that Dole and other Republican legislators had been angered by Vice President Gore's attempts to take political credit for the telecommunications reform bill. In January, 1996 Senator Dole questioned whether broadcasters should be given public frequencies without remuneration. Dole's remarks threatened to scuttle the whole telecommunications reform package. Rather than see the bill unravel on this one issue, Senator Larry Pressler (R-SD) and Representative Thomas J. Bliley (R-VA) convinced Dole to put the issue off until after passage of the legislation.

As a result the Act does not resolve whether television spectrum will continue to be licensed without fee or auctioned off in the future. It does, however, indicate that if the FCC someday issues additional licenses for advanced television services (ATS), existing television licensees would be given the first option on these new spectrum allocations. The Act also states that new licensees would be required to give back their duplicate spectrum, but it permits the holders of any new licenses to offer other telecommunication services in addition to digital television signals on the new frequencies. Thus, it grants broadcasters "spectrum flexibility," but it states that new offerings could not be made at the expense of ATS services. This is not as paradoxical as it would at first appear. Anticipated advances in compressing digital signals should make it possible to squeeze an advanced television signal, along with several other wireless services, into the amount of spectrum space that has been proposed to be set aside for a single new digital TV channel.

The Act continues to favor the commercial broadcast model over a subscription or pay-per-view model for advanced television services. If the licensee offers a subscription, rather than free broadcast programming on one of the new frequencies, then the licensee would have to share some of the program service fees with the U.S. Treasury. Finally, although the Act fails to resolve the difficult issue of whether to auction or give away public spectrum to broadcasters, it does call for 5- and 10-year studies that will evaluate the utility of any eventual ATS deployment policy.

Sec. 202. Broadcast Ownership

The Act eliminates all national restrictions on radio consolidation by a single owner. It also relaxes, but does not entirely eliminate, current local restrictions on the amount of radio stations that an individual or company can own. In large markets with 45 or more "commercial" radio stations, a single company will be allowed to increase its holdings to 8 stations. However, no more than 5 of those owned stations can be situated on either the AM or FM band. This clause is designed to prevent a single company from dominating either the AM or FM broadcasting within a community. In smaller markets the number of radio stations that can be owned by a single entity decreases incrementally, until communities with 14 or fewer radio stations may not have more than 5 of those stations under one owner. Furthermore, the Act grants the FCC the right to waive these consolidation restrictions if a company wants to start a new station, rather than buy an existing one. This would increase the overall amount of radio choices available within a market.

Presently, no single broadcast entity can own television stations that reach more than 25 percent of the over-the-air national TV audience. The Act increases that ownership limit to 35 percent of the national broadcast audience. The new law specifically states that the current one-to-a-market ownership limits should be relaxed in the 50 largest television markets. It also calls upon the FCC to conduct new rulemaking proceedings to determine how many TV stations can be owned within all television markets. Under the Act individual stations are permitted to affiliate with more than one national network.

Now that the Act is law, networks will be permitted to buy cable television systems in the same community in which they also own a broadcast station. Conversely, cable companies may buy a broadcast operation in the communities that their cable systems now operate. The act calls for safeguards to ensure that cable operators do not discriminate against the signals of broadcasters owned by their competitors.

Although Federal antitrust rules still cover cable or broadcast operations, there are no specific provisions requiring Department of Justice review of broadcast and cable mergers and acquisitions. This makes the FCC the first line of defense against uncompetitive practices by consolidated broadcast and cable companies. The Act requires the FCC to make a complete review of its ownership rules every two years. The purpose of this review will be to promote competition.

Sec. 203. Broadcast License Renewals

In a compromise between the proponents and opponents of broadcast regulation, the rules on license renewals make it easier for companies to hold on to their current over-the-air allocations. Broadcast license terms will increase to 8 years and the license renewal process will be expedited by requiring broadcasters to file fewer public-interest materials when requesting license extensions for another 8-year period. Furthermore, the FCC is only permitted to consider the renewal merits of the current license holder's case at hand, not whether another broadcaster might better serve the public interest if it were granted the right to broadcast over the frequency. Thus, the law moves further toward an existing ownership model and away from a public service model for broadcast licensing.

Title III -- Cable Services

Sec. 301-303

Franchising authorities are prohibited from granting exclusive cable contracts in a service area. If a cable operator wants to compete with another cable company or phone company that provides video services, there should be no governmental barrier to prevent it.

Pricing for "upper tier" or nonbasic cable services will be deregulated by March 31, 1999. Only basic tier -- over the air and public-educational channels -- can be regulated after that date. Cable operators are required to notify customers of any change in rates. However, reviews of cable rate changes by the franchising authority will not be made unless the franchising authority receives consumer complaints within 90 days of the rate change. Common carriers that deliver basic and upper tier video programming by wired or wireless means are also subject to the anti-buyout provisions and rate regulations affecting "cable" companies.

The regulations on cable rates will be relaxed even sooner in markets where there is effective competition among cable services. The Act also contains a series of provisions that exempt small cable companies with less than 1 percent of the total U.S. cable subscriptions, with fewer than 50,000 customers, or those cable providers that serve rural areas from adhering to all the rate regulations of the 1992 Cable Act and those required of larger cable providers by the current Act.

Sec. 651-653

The Act contains some measures to prevent buyouts, joint ventures, and other anti-competitive collusion between cable and telephone companies that provide video services in an area. In general, cable companies and local exchange telephone companies providing video service in the same area may not acquire an ownership interest of more than 10 percent in each other. Yet, companies operating in a market that is not among the top 25 in the country and which already have competing cable companies may acquire each other.

Telephone and cable companies may not enter into a joint cable venture unless they operate outside an urbanized area, market their services in an area with less than 35,000 inhabitants, or when combined still serve less than 10 percent of the households in the area. They may also share a wire from the curb into a single home if the sharing is found to be "reasonably limited in scope and duration" by the FCC. Finally, the Act permits specific competitive exemptions for very small video service providers and encourages the FCC to provide waivers in areas where strict adherence to the anti-collusion guidelines would make service delivery economically unfeasible.

By August 8, 1996, the FCC is required to prescribe regulations for a new brand of video service, called "open video systems" (OVS). These systems, which will be sold primarily by the local phone company, are anticipated to offer many video channels and programs on a prescheduled basis. They should satisfy many of the functions now satisfied by cable providers.

Telephone companies offering "open video systems" need not act as common carriers. They are not required to permit cable companies to interconnect or offer services over their systems without charging additional fees, since that type of common carrier status would make it impossible for OVS companies to compete with cable companies. When demand for OVS channel capacity exceeds the ability of an open video system provider to deliver, the OVS provider may act to select programming, or act as gatekeeper, on only one-third or less of the active channels it offers. Description of how the other two-thirds of the channels will be utilized should be included in forthcoming FCC rulings.

The Act also changed the statutory term used to describe point-to-point and point-to-multipoint two-way video service. The old term, "video-dialtone," has been replaced by "interactive on-demand services."

Sec. 713. Video Programming Accessibility

The FCC will issue a report to Congress within 180 days on the extent to which video programs are closed captioned. Within 2 years the Commission will implement regulations requiring all new programming to be closed captioned except for those programs for which captioning would be "economically burdensome" or create an "undue burden," according to four specific criteria.

Within 6 months of the Acts becoming law the FCC will issue a report on providing "video descriptions" for visually impaired citizens. The study will examine ways for phasing video descriptions into the marketplace.

TITLE V -- Obscenity and Violence

Sec. 501. Communications Decency Act of 1996 (Pending)

Sec. 502. Obscene or Harassing Use of Telecommunications Facilities Under the Communications Act of 1934.

This section makes it a crime punishable by up to two years in prison, as well as steep fines, to knowingly use a phone or other telecommunications device to make or solicit "obscene, lewd, filthy, or indecent" comments or images with the "intent to annoy, abuse, threaten, or harass another person." Both anonymous calling and repeated ringing of a phone in order to harass someone are specifically cited as prohibited activities. Furthermore, even if a minor initiates the communication, it is illegal to knowingly transmit indecent or obscene materials to the minor. Facilities managers who knowingly provide services for harassing activities can also be held legally responsible.

"Interactive computer services," which would include most Internet providers, are not treated as common carriers for indecency purposes. Thus, it is against the law to use an "interactive computer service" to send or display to persons under 18 years of age "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication." Once again, facilities managers who knowingly permit such contents to be created and transmitted from the manager's facilities could also be prosecuted.

A facilities manager who has in good faith attempted to prevent or restrict minors from receiving such indecent or obscene materials can not be held legally responsible for blocking transmission of the materials. In fact, the Act encourages such "good faith" censorship efforts by asserting that they should constitute a defense against prosecution.

In addition to existing laws which prohibit the solicitation of sexual acts by minors, this activity is further subjected to fines and imprisonment by the Communications Decency Act.

Sec. 640-641, 506

Cable subscribers who request not to be exposed to certain premium channels, should be able to have the objectionable premium channels scrambled by the service provider. Similarly, all sexually explicit adult video services should either scramble their signals or show those materials late at night so that children do not inadvertently find the programs.

For years, cable providers have not been allowed to censor public access channels. As a result, some of the most stark nudity and sexually explicit programs have been shown on public access channels. The Act now grants cable services permission to refuse to transmit on public, educational, and governmental access channels, as well as commercial leased access channels, programs that contain "obscenity, indecency, or nudity."

Sec. 509. Online Family Empowerment Act

The Act officially states that with regard to the Internet and interactive computer services, the United States should encourage individual and family efforts to control the types of contents they receive. Therefore, blocking, filtering, and screening technologies that empower parents to control their children's incoming computer messages are preferable to government controls.

The law makes a distinction between an interactive computer service that distributes computerized messages and the originator of such messages, which is defined as an "information content provider." Internet services and other computer network services are not to be held liable for voluntarily making "good faith" efforts to restrict obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" contents. Furthermore, information services, which distribute but do not create such messages, are not to be treated as "information content providers." Yet, existing Federal laws to deter "obscenity, stalking, and harassment by means of computer" will be vigorous enforced.

Sec. 551-552. Parental Choice in Television Programming

The law asserts that television programming, particularly violent and sexually explicit material, influences viewers' values and behaviors. Therefore, there is a compelling need to provide parents with a technological means of blocking violent, sexual, or other harmful programs from their children. The Act maintains that such a means would be "narrowly tailored" and "nonintrusive."

The Act challenges distributors of video programming to "voluntarily" set up a system for rating the "sexual, violent, and other indecent" content of their programs so that parents can make their own efforts to prevent their children from seeing objectionable material. Programs can then be electronically tagged with these ratings. The Act gives video distributors one year to accomplish this task to the satisfaction of the FCC, public interest groups, and private citizens. If not, then the FCC is charged to create a committee composed of "parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector. The committee shall be balanced in terms of political views and political affiliation. It will submit a report within a year, which would be February 8, 1999, to recommend ways to create such a ratings system.

The program ratings system will work with what has popularly been called the "V-chip" technology. The Act requires that the device be built into all new television sets that have screens 13 inches or larger. The chips will be programmable to block shows that have been tagged with specific violent, sexual, or indecent ratings. This should enable parents to exert greater control over their children's viewing options.

The FCC will fund any ratings committee and create a "technology fund" to provide the ratings system and V-chip technology to low income families at affordable prices. The act specifically states that political and religious contents will not be rated.

Sec. 601-602.

When there is a conflict between prior consent decrees and the provisions of the Act, the Act generally takes precedence. Direct-broadcast-satellites, or what the Act calls "direct-to-home satellite service," is specifically exempted for all local taxes. Only state and Federal taxes can apply to this form of service.

Title VII – Miscellaneous Provisions

Sec. 701

Some 800 numbers serve as routing numbers for customer billed phone calls. The Act states that charges for using 800 numbers must be explicitly stated prior to the start of the billed portion of an 800 call.

Sec. 222. Privacy of Customer Information

The Act addresses some customers' concerns about the privacy of their personal information. In general, customer information can be shared between telecommunication companies so that billing and interconnection can be accomplished. However, this sharing of what the Act labels as "proprietary customer information" must be narrowly tailored to meet only the billing and interconnection needs of the respective telecommunication companies. Any further use of customer information requires the permission of the customer or a court order. Aggregated customer information, which does not permit individual identification, can be compiled and distributed.

Sec. 703. Poles Attachments

In general, the Act ensures that utility companies provide access to competitors and telecommunications service providers on their utility poles and rights of way. They can charge a reasonable fee for such access, so long as the fee is nondiscriminatory or equivalent to what they charge their own subsidiary for the same access.

Sec. 705. Mobile Services Direct Access to Long Distance Carriers

Mobile services must provide their customers with access to all interconnected long distance services. This clause is designed to prevent mobile services from funneling their customers' long distance business to a particular long distance provider.

Sec. 706. Advanced Telecommunication Incentives

FCC Chair Reed Hundt (Newshour, Feb. 8, 1996) recently claimed that the incentives, which encourage private enterprise to build an advanced telecommunication infrastructure for all Americans, will be the greatest legacy of the Telecommunication Act of 1996.

This section of the Act calls upon the FCC and the individual state commissions that have regulatory oversight on intrastate telecommunications to ensure that in the near future high-speed, switched, broadband two-way transmission of voice, data, graphics, and video (advanced telecommunications capability) is available in every U.S. school and classroom. This should be accomplished by removing barriers to developing such an infrastructure, as well as through pricing and service regulation.

Within 30 months after the February 8 signing of the Act, the FCC is charged with initiating an "inquiry" into the availability of advanced telecommunications in schools, as well as for all Americans. The inquiry report should be completed within 6 months of its initiation. If the inquiry finds that such services are not available, the FCC should take the action to achieve these goals through competitive mechanisms.

Sec. 714. Telecommunications Development Fund

A Telecommunications Development Fund will be established to promote access to capital for small businesses with less than $50 million in annual revenues, to promote universal service goals, and to stimulate new technology and training for employment in new communication fields. The Fund will be led by a 7-person Board of Directors appointed by the chair of the FCC. They will serve for 5-year terms, with terms beginning and ending on a staggered basis.

Sec. 708. National Education Technology Funding Corporation.

A private nonprofit National Education Technology Funding Corporation will be established to stimulate investment in educational technology infrastructure through the dispersion of loans and grants, to create interactive high capacity networks for schools and public libraries, to ensure that all schools have universal access to such technologies, and to encourage private-public partnerships that benefit educational objectives. The Corporation will be directed by a 15-person board made up of 5 educators, 5 members of state government who are informed on communication technology issues, and 5 experts from the private sector.

Sec. 709. Report on the Use of Advanced Telecommunications Services for Medical Purposes.

By January 31, 1997, the Secretary of Commerce, in consultation with various Federal agencies and groups, will present a report on the utilization of advanced telecommunication services for medical purposes.

Sec. 710. Authorization of Appropriations

The Act calls for appropriating funds to the FCC so that it can perform the duties required by the Act. This is an important point, because failures of the Telecommunications Act of 1934 were due to Congressional underfunding of the newly created FCC. Yet, there is no specific language to ensure that Congress will appropriate adequate funding so that the FCC can carry out the many tasks required of it. Without adequate funding, the FCC will be unable to create the rules and issue the reports called for in the law. Thus, Congress holds the key to the overall implementation of this law. In 1934, Congress chose to withhold adequate funding from the FCC. Thus, little was changed by the 1934 legislation. Surely, the telecommunications landscape will change whether Congress appropriates money or not. But how that change gets managed is dependent on adequate appropriations by Congress.